

(25,552)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 722.

HANS BERG, PRIZE MASTER IN CHARGE OF THE PRIZE
SHIP "APPAM," AND L. M. VON SCHILLING, VICE
CONSUL OF THE GERMAN EMPIRE, APPELLANTS,

vs.

HENRY G. HARRISON, MASTER OF THE STEAMSHIP
"APPAM."

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF VIRGINIA.

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a *Transcript of Record.*

HANS BERG, Prize Master in Charge of the Prize Ship "Appam,"
and L. M. Von Schilling, Vice-Consul of the German Empire,
Appellants,

versus

HENRY G. HARRISON, as Master of the Steamship "Appam,"
Appellee.

Appeal from the District Court of the United States for the Eastern
District of Virginia, at Norfolk, Virginia.

Proctors of Record.

Messrs. Frederick W. Lehmann, of St. Louis, Mo.; John W. Clifton, Norvin R. Lindheim and Walter S. Penfield, of Washington, D. C.

Messrs. Hughes, Little & Seawell (Mr. Robert M. Hughes), of Norfolk, Virginia, Proctors for appellants.

Messrs. Barry, Wainwright, Thacher & Symmers (Mr. J. K. Symmers), of New York City.

Messrs. Hughes & Vandeventer (Mr. Floyd Hughes), of Norfolk, Virginia, Proctors for appellee.

1 *Transcript of Record.*

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

At a District Court of the United States for the Eastern District of Virginia, begun and held at the United States court room in the Court House and Post Office Building in the City of Norfolk, Virginia, on the first Monday in the month of May, being the first day of the same month, in the year of our Lord, one thousand nine hundred and sixteen.

Present:

The Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

No. 2093. In Admiralty.

HENRY G. HARRISON, Master,
VERSUS
CARGO OF THE STEAMSHIP "APPAM."

2

Libel.

Filed March 13th, 1916.

To the Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia:

The libel of Henry G. Harrison as master of the steamship "Appam" against the cargo laden on board said steamship and against all persons lawfully intervening for their interests in said cargo, in a cause of possession, civil, tort and maritime, alleges as follows:

First. That at all the times hereinafter mentioned libelant was and still is the master of the steamer "Appam" now lying in Hampton Roads, and at all times hereinafter mentioned had possession of said vessel and of her cargo as such master.

Second. Said cargo is wrongfully withheld from the libelant and from the true and lawful owners thereof by one Hans Berg and other persons unknown to the libelant.

Third. Said steamship "Appam" sailed from Dakar, Africa, on or about January 11, 1916, bound for Liverpool, England. On or about the 16th day of January, 1916, she was seized by certain persons unknown to the libelant, and thereafter under compulsion was forced to proceed with her passengers, crew and cargo to Hampton Roads, where she arrived on the 1st day of February, 1916, since which time she has been either at Hampton Roads or Newport News, Virginia, in this District.

3 Fourth. On information and belief, libelant alleges that the said steamer "Appam," being a British vessel, was seized on the high seas on or about January 16, 1916, by a German vessel called the "Mowe" and was placed by the commander of said captor vessel in charge of one Hans Berg and others, and under compulsion was by them forced to proceed as aforesaid, and has been and is now held by the said Hans Berg and other persons placed on board from the "Mowe" as an alleged prize of war belonging to and the property of the German Empire.

Fifth. Upon information and belief, that the Prize Code of the German Empire in effect since 1909 provides as follows:

"111. The commander provides for bringing the vessel into a German port or the port of an ally with all possible dispatch and safety.

A prize may be brought into a neutral port only if the neutral power permits the bringing in of prizes. A prize may be taken into a neutral port on account of unseaworthiness, stress of weather, or

lack of fuel or supplies. In the latter cases she must leave as soon as the cause justifying her entrance ceases to exist."

Sixth. That the steamship "Appam" with her cargo arrived at Hampton Roads on the 1st day of February, 1916, in a seaworthy condition. That since that time she has been removed to the port of Newport News, where she is now lying at anchor in the custody of this court under and in accordance with process issued by this court as prayed for in a libel filed by the British & African Steam Navigation Co. Ltd. against said vessel in a suit for possession thereof; that according to the law of Nations and the laws of the United States

the cargo of said steamship "Appam" has been and is unlawfully held and detained at Newport News; and that by holding and detaining the said cargo at Newport News, the said Hans Berg and others above referred to as assisting him have violated the law of Nations and the laws of the United States and the neutrality of the United States; and that according to the law of Nations and the laws of the United States the libelant is entitled to possession of the cargo laden on board said steamship as aforesaid.

Seventh. Libelant further alleges, upon information and belief, that prior to the arrival of said steamship "Appam" and her cargo at Hampton Roads and in the port of Newport News, and since the said arrival the said Hans Berg and the other persons above mentioned as assisting him, or other persons unknown to libelant, have removed or caused to be removed portions of the cargo of the said steamship in violation of the law of Nations and the laws of the United States and in violation of the neutrality of the United States.

Eighth. Upon information and belief, the said cargo was and is of very great value and a large portion thereof by reason of its nature and character is subject to deterioration and at least partial destruction, and will deteriorate and be to considerable extent destroyed in value unless possession thereof be promptly given to libelant for carriage to destination or for such treatment as will prevent its further deterioration and loss of condition and value.

Ninth. All and singular the premises are true and within the jurisdiction of the United States and of this Honorable Court.

Wherefore the libelant prays that process in due form of law according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the cargo laden on board said steamship "Appam," and that Hans Berg and any and all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid; that the said cargo may be delivered to the libelant, and that libelant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

BARRY, WAINWRIGHT, THACHER &
SYMMERS,

HUGHES & VANDEVENTER,

Proctors for Libelant.

FLOYD HUGHES,
JAMES K. SYMMERS,

Advocates.

STATE OF NEW YORK,
County of New York:

Henry G. Harrison, being duly sworn, says that he is the libelant above named; that he has read the foregoing libel, knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

(Signed)

HENRY GEORGE HARRISON.

Sworn to before me this 11th day of March, 1916.

[SEAL.]

GEORGE A. CONROY,
Notary Public, Queen's County.

Certificate filed New York Co. #149.

Protest of Lieutenant Hans Berg.

Filed March 17th, 1916.

March 15, 1916.

Mr. John G. Saunders, United States Marshal, Norfolk, Virginia.

DEAR SIR: In relation to the process served on me on board the Appam Tuesday, March 14th, 1916, I feel it my duty again to protest respectfully (as I have already done verbally) against any service of process or interference with my full control of the same as Lieutenant Commander on behalf of the Government of the German Empire.

Yours truly,

BERG,
Lt. r. r. r. Rmdt. r. Appam.

Marshal's Report of Receipt of Communication from Lieutenant Berg.

Filed March 17th, 1916.

To the Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia:

I respectfully beg leave to report to your Honor, that I have this day received the attached communication from Lieutenant Berg in relation to the process served on him on board the s. s. Appam Tuesday, March 14th, 1916, in this cause issued, which speaks for itself.

Respectfully submitted,

JOHN G. SAUNDERS,
United States Marshal.

Richmond, Va., March 17th, 1916.

7 *Claim of Hans Berg, Prize Master, and L. M. von Schilling,
Vice-Consul of the German Empire.*

Filed March 31st, 1916.

To the Honorable Edmund Waddill, Jr., Judge of the Court aforesaid:

Claim.

Hans Berg, Master in charge of the Prize Ship "Appam" and L. M. von Schilling, Vice-Consul of the German Empire for the District comprising Newport News, Norfolk and Portsmouth, and all waters contiguous thereto, hereby claim the cargo of the Steamship "Appam" proceeded against in this cause and aver that it is the property of the German Empire and that no other person is the owner thereof and they further severally aver that they are duly authorized hereto by said owner and that the said Hans Berg is Master of the Prize Ship "Appam" and as such is bailee of the said cargo for the said owner.

HANS BERG, *Prize Master.*
L. M. VON SCHILLING,
Vice-Consul of the German Empire.

STATE OF VIRGINIA,
Corporation of the City of Norfolk, to-wit:

Now this 31st day of March in the year 1916, personally appeared before me Hans Berg, who duly signed and made affidavit to the truth of the matters and things above contained.

I. V. WHITE,
Notary Public.

STATE OF VIRGINIA,
Corporation of the City of Norfolk, to-wit:

Now this 31st day of March in the year 1916 personally appeared before me L. M. von Schilling, who duly signed and made affidavit to the truth of the matters and things above contained.

I. V. WHITE,
Notary Public.

8 *Exceptions, Plea, and Answer.*

Filed March 31st, 1916.

To the Honorable Edmund Waddill, Jr., Judge of the Court aforesaid:

The exceptions, plea and answer of Hans Berg, Prize Master in charge of the prize ship Appam, and L. M. von Schilling, Vice-Consul of the German Empire for the District comprising Newport News, Norfolk and Portsmouth, and all waters contiguous thereto,

to the libel in this cause. These respondents except to the said libel on the following grounds:

First. It appears therefrom that the duties of the libellant as Master were suspended and nullified by the capture of said steamship "Appam," as lawful prize of war, and that since then he has not had such possession as bailee as would entitle him to libel for the cargo mentioned in his libel.

Second. That admitting, for the purpose of this exception only, that the allegations of the said libel are true, there are no facts set out which show any violation of the neutrality of the United States.

Third. That even if the said allegations can be considered
9 as showing any violation of such neutrality, it was not such a violation as is a matter for the court and not such as would give any ground for restoring the possession of the said cargo of the said steamer "Appam" to the libellant herein.

Fourth. That it sufficiently appears from the allegations of said libel that the said steamer "Appam" and her cargo were and are lawful prize of war belonging to and the property of the said German Empire and that by the Law of Nations the title of the said German Empire to the said prize cannot be inquired into in these proceedings, and, that by the treaties now in force between the German Empire and the United States of America and, also, by the Law of Nations the said prize was entitled to enter the harbor of Newport News and is exempt from any legal process of arrest, search, or otherwise, in the premises, and that this court is without jurisdiction of the alleged cause of action purporting to be set forth in said libel.

And by way of answer to said libel, without waiving any of the said exceptions, these respondents say as follows:

First. The respondents deny the allegations in the first article of the libel as to any transactions after January 16th, 1916.

Second. They deny the statements contained in the second article of said libel.

Third. These respondents have no knowledge when nor whence said steamship sailed, and therefore neither admit nor deny the same but call for strict proof thereof. They deny that on or about the 16th day of January, 1916, or at any time thereafter she was unlawfully seized by certain persons unknown to the libellant, though they admit that she was brought into Hampton Roads under the circumstances hereafter described, and that she is now at the
port of Newport News, Virginia.

10 Fourth. These respondents admit the allegations of the fourth paragraph of the libel, except that they aver that the respondent Hans Berg was in charge of the navigation of the said steamer, after her capture and while she was being brought into port and they further aver that she is an actual prize of war, belonging to and the property of the German Empire.

Fifth. These respondents deny that the German Prize Code is correctly quoted in the libel and call for strict proof thereof, if material.

Sixth. It is true that the Steamship "Appam" arrived at Hampton

Roads on the first day of February, 1916. At the time she was not in a seaworthy condition. She was manned by a prize crew of only twenty-two men, and she had on board the crew and passengers of the captured steamer as prisoners, who aggregated about four hundred persons. Of these the crew alone consisted of about one hundred and sixty, she being a very large steamer and requiring a very large crew to handle her. She was short of water, provisions and fuel, and was necessarily obliged to come into a harbor as a matter of necessity and humanity. Her machinery also needed overhauling. It is true that she was afterwards removed to the port of Newport News when pratique was granted and official visits made. It does not appear that according to the Law of Nations and the laws of the United States they have not been and are not entitled to hold and detain the said steamer at Newport News. The prize master brought her into Newport News in good faith, relying upon the treaty between the United States of America and the German Empire, which provides as follows:

11 "The vessels of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs or any others: nor shall such prizes be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to show. (But conformably to the treaties existing between the United States and Great Britain, no vessel that shall have made a prize upon British subjects shall have a right to shelter in the ports of the United States, but if forced therein by tempests, or any other danger or accident of the sea, they shall be obliged to depart as soon as possible.)"

This is an old treaty and was originally both in French and English. The French form of the same is as follows:

"Les vaisseaux de guerre publics et particuliers des deux Parties Contractantes pourront conduire en toute liberte, partout ou il leur plaira, les vaisseaux et effets qu'ils auront pris sur leurs ennemis, sans etre obligees de payer aucuns impots, charges ou droits aux Officiers de l'Amirauté, des Douanes ou autres. Ces prises ne pourront etre non plus ni arretees, ni visitees, ni soumises a des procedures legales, en entrant dans le port de l'autre partie, mais elles pourront en sortir librement, et etre conduites en tout temps par le vaisseau preneur aux endroits portes pas les commissions, dont l'officier Commandant le dit vaisseau sera oblige de faire montre.

(Mais, conformement aux Traites subsistans entre les Etats-Unis et la Grande Bretagne, tout vaisseau qui aura fait une prise sur des sujets de cette derniere Puissance, ne saurait obtenir un droit d'asile dans les ports des Etats-Unis: et s'il est force d'y relacher par des tempets ou quelque autre danger, au accident de mer, il sera oblige d'en repartir le plutet possible.)"

12 (The parts in parenthesis lapsed and were not revived by the existing treaty of 1828, and are no longer in force.)

These respondents aver also that by the general principles of international law the prize master was entitled to bring his ship into this neutral port under the circumstances above set forth, and that the length of his stay herein is not a matter for determination in a judicial tribunal of the United States.

Seventh. The respondents deny the averments of the seventh article of the said libel.

Eighth. These respondents, while believing that some of the cargo may be subject to deterioration, deny the right of the libellant to claim it now or at any future time.

Ninth. These respondents deny the ninth article of the libel.

And further answering these respondents state that the steamer "Appam" while a British vessel was captured on the high seas on January 15th, 1916, during the existence of a state of war between Great Britain and the German Empire, by the Mowe, a man-of-war of the German Empire, and became a lawful prize of war of said Empire, and was placed by the commander of said captor vessel in charge of Hans Berg, a lieutenant in the naval force of said German Empire, and a prize crew composed of men in the naval service of said Empire, and was brought into the port of Newport News Virginia, and is now held by the said Hans Berg and his said prize crew as a lawful prize of war belonging to and the property of the said German Empire.

13 Further answering these respondents say that proceedings have been instituted in a proper prize court of competent jurisdiction in Germany for the condemnation of the said steamer Appam and her cargo as prize of war, and that such proceedings are now pending. Said proceedings are being pressed with all the speed possible under the rules of procedure that there prevail, and these respondents respectfully pray this court to suspend all further proceedings until the said prize proceedings are brought to an end, and proper evidence thereof is laid before this court.

And these respondents respectfully represent that this court ought not to take jurisdiction in this cause and they pray that the libel be dismissed.

HANS BERG, *Prize Master.*

L. M. VON SCHILLING,

Vice-Consul of the German Empire.

JOHN W. CLIFTON,
HUGHES, LITTLE & SEAWELL,
NORVIN R. LINDHEIM,
WALTER S. PENFIELD,

Proctors for Respondent.

14 STATE OF VIRGINIA,

Corporation of the City of Norfolk, to-wit:

Now this 31st day of March in the year 1916 personally appeared before me Hans Berg, who duly signed and made affidavit to the truth of the matters and things above contained.

I. V. WHITE,
Notary Public.

STATE OF VIRGINIA,

Corporation of the City of Norfolk, to-wit:

Now this 31st day of March in the year 1916 personally appeared before me L. M. von Schilling, who duly signed and made affidavit to the truth of the matters and things above contained.

I. V. WHITE,
Notary Public.

- 15 *Interrogatories Filed by the Libellant and Propounded to Hans Berg "Prize Master" and L. M. von Schilling, Vice-Consul of the German Empire, They Having Made Claim and Filed Answer in These Proceedings on March 31, 1916; said Interrogatories to be Separately and Individually Answered by said Hans Berg "Prize Master" and said L. M. von Schilling, Vice-Consul as Aforesaid.*

As Allowed by the Court.

Filed April 8th, 1916.

First interrogatory; Omitted.

Second interrogatory. (a) State the position by latitude and longitude of the steamship Appam when she was captured.

(b) State the day and hour when she was captured.

(c), (d) and (e) omitted; the following allowed in lieu thereof:

State what amount of coal and supplies were consumed on the Steamship Appam from time of capture until arrival at Hampton Roads and what amounts, if any, were taken aboard during that period.

(f) State in detail what part of, and in what respect the Appam's machinery needed overhauling.

(g) State in detail in what respect the Appam was unseaworthy at the time of her arrival at Hampton Roads on February 1st, 1916.

(h) Was any request made to the United States Government authorities or Port authorities or other authorities for permission to make repairs or have the Appam surveyed preliminary to making repairs, or was any attempt made to make repairs or any steps taken looking to the making of repairs?

(i) If so, set forth the same in detail.

(j) State whether Henry G. Harrison was the master of the Appam at the time she was captured and in possession thereof.

Third interrogatory: (a) State in detail what papers were removed from the Appam after her capture.

(b) Did you remove the registry of the Appam?

(c) State what property was removed from the Appam?

(d) State whether the articles mentioned in the list annexed hereto and marked "Schedule A" were not removed from the vessel?

(e) If you state they were, state when, by whom and to what place?

(f) Did you sell any portion of the cargo or provisions?

(g) If you did, state to whom, and what you did receive for the same?

Fourth interrogatory: Omitted.

Fifth interrogatory: (a) On the arrival of the Appam at Hampton Roads did you deliver any papers *and* or documents to any one?

(b) If so, when and to whom?

17 (c) Describe in detail the papers *and* or documents you delivered.

(d) When and where have prize proceedings, if any, been instituted in the Empire of Germany.

(e) If you State Prize Proceedings have been instituted in Germany, state what is the present status of such proceedings.

HUGHES & VANDEVENTER,
Of Counsel.

18

"SCHEDULE A."

(x.013.)

Elder Dempster and Co., Limited.

19

Received from the purser on board the vessel's cash a/c showing a balance of £344. 18. 1. also contents of Till as under

Cheque to Order of Elder Dempster & Co.....	£218. 0.11
Four x £ 5 notes.....	20.
Fourteen x £1	14.
Eighty seven x 10/.....	43. 10
Silver	26. 15
Marks 29	1. 9
Health Insurance Stamps.....	0. 16
Postage Vouchers	13. 5
Receipt from crew for cash.....	2. 15
Cheques to order of Lieut. Berg.....	5. 10. 11
Cash M. F. S. James.....	11. 7. 10
	<hr/>
	£344. 18. 1

19

Answer- to Interrogatories.

Filed April 18th, 1916.

Answers by Hans Berg.

First interrogatory: Omitted.

(33.05)

Second interrogatory: (a) Latitude 35.05' N. longitude 14' 20' W. as far as I can remember.

(b) January 15, 1916. I do not know the exact hour, but somewhere between 12 Noon and 2 P. M.

(c), (d) and (e): When the "Appam" arrived we had only about 50 tons of coal left. Her provisions were practically exhausted. No supplies of any sort were taken on from the time of the capture 'till arrival. The exact amount consumed in that period would be ascertained by deducting the amount used up to the time of the capture from the total amount taken on at the beginning of the voyage, which information is at the disposal of libellant.

(f) I do not profess to be familiar with the machinery of the "Appam," she being a large vessel and my navigation of her being only for a short period with a small crew. I understood, however, that her engines and boilers needed overhauling, and there may be other particulars also in which she needed overhauling.

20 (g) The "Appam" on arrival was unseaworthy, first, because of her small crew; second, because her fuel and engine oil were about exhausted; third, because her water and provisions were exhausted; fourth, because of the overhauling above mentioned; fifth, there may have been other matters unknown to me.

(h) The only thing done by me was a verbal report to the Collector of Customs that some repairs were necessary, no repairs made except by my own crew (still incomplete) on most necessary work.

(i) Answered above.

(j) I do not know whether Henry G. Harrison was Master of the "Appam" at the time she was captured and in possession thereof or not. I did not go aboard the "Appam" until the day after she was captured, and had no personal knowledge of anything that occurred aboard of her before that time. I only know he claims to be Master.

Answer to 3rd Interrogatory.

(a) As I did not go aboard the "Appam" until the day after her capture, and was not in command of the captor vessel, I do not know personally what papers were removed, though I do not deny that they were.

(b) I did not.

(c) For reasons given above, I do not know personally what property was moved from the "Appam."

(d) The aggregate named in Schedule "A" is correct and still aboard.

21 (e) Answered above.

(f) The only articles sold were from the bar. On the voyage I permitted the steward to run the bar, requiring him to account to me for the amount sold.

(g) The total proceeds of such sales were about £300 cash and checks.

I answered questions d, e, f and g denying that same are material to the issues in this cause or that same are covered by the libel in this cause.

Answer to Fourth Interrogatory: Omitted.

Answer to Fifth Interrogatory.

(a) I gave to Mr. Hamilton, the Collector of Customs, a copy of

my authority from the Commander of the Möwe, which is in the following words:

Ausweis.

für die amerikanischen Behörden.

Vorseizer dioses, der Leunant zur Sec. d. Res. Berg, ist von mir zum Kommandanten des aufgebrachten englischen Dampfers "Appam" ornannt worden und hat Befehl, das Schiff in den nächsten amerikanischen Hafen zu bringen, und dert aufzulegen.

Zommando S. M. H. Möwe

Graf zu Dohna

Korvetten—Kapitän und Kommandant.

Kaiserliche Marine

Beiefstempeel

Kommando S. M. H. Möwe.

I also sent a copy to the Embassy.

(b) Answered above.

(c) Answered above as far as I can recollect. There have been so many transactions and transformations since my arrival that
22 it is possible I may have omitted something, though I do not think so.

(d) I am officially informed by the message communicated to me from the German Embassy that prize proceedings were instituted in Germany on February 11, 1916, and that they are still pending.

(e) I have no information as to their present status.

Answers by L. M. von Schilling.

As I was not aboard the "Appam" and knew nothing about the transaction until after her arrival I cannot answer from any personal knowledge.

Answer to First Interrogatory. Omitted.

Answer to Second Interrogatory.

I decline to answer because I have no personal knowledge of any facts bearing on the question therein set forth.

Answer to Third Interrogatory.

I cannot answer for the same reason.

Answer to Fourth Interrogatory.

I decline to answer for reasons given.

23

Answer to Fifth Interrogatory.

I cannot answer for want of knowledge.

(Signed)

H. BERG.

(Signed)

L. M. VON SCHILLING.

Subscribed and sworn to before me this 18th day of April, A. D. 1916.

(Signed)

M. C. COPELAND,

Notary Public.

24

Affidavit of Hans Berg.

Filed May 12th, 1916.

This day personally appeared Lieutenant Hans Berg and made affidavit as follows:

I have been officially furnished with a copy of the cablegrams sent by the German Embassy through the State Department to Germany, and a copy of the replies from Germany, and I attach the same to this affidavit marked "Exhibits 1 and 2." I have not secured all the necessary papers by the date set for this hearing, and I lack the following evidence.

A copy of the decision of the prize court.

I also state that I was not upon the Appam until the day after her capture and that I have no personal knowledge of anything that occurred aboard of her until I went aboard except what I could see from the Möwe; that the evidence of Count Dohna, the Commander of the Möwe, who knows what transpired during that time, what papers, if any, were removed and what else, if anything, was removed, is material, and I respectfully represent that it is necessary in order to properly prepare my defense that a commission issue in order to take his testimony: also to take the testimony of First Lieutenant Pohlmann, First Lieutenant Kuhl and others, who were sent in the small ship's boat to board the Appam at the time and know what transpired, the boat being in charge of First Lieutenant Pohlmann; and none of them being now with me.

HANS BERG.

25

Subscribed and sworn to before me this 12th day of May, 1916.

M. C. COPELAND,

Notary Public.

Filed May 12th, 1916.

DISTRICT OF COLUMBIA,

City of Washington:

I, Prince Von Hatzfeldt-Trachenberg, Counsellor of the Imperial Germany Embassy, Washington, D. C., being duly sworn, do depose and say as follows:

The official records of the Embassy show that, in order to facilitate the preparation and to expedite the trial of the Appam case, the German Embassy transmitted and received, relating thereto, the following Radio-grams:

Sent—1.

March 6, 1916.

Have Prize-Court immediately act on Appam case and send certified copies of the judgment of the prize-court. Also send certified copies of the commission of the commander of the Moewe and commission of Lieutenant Berg as an officer in the German Navy. Also send a certified copy of the commission of the Moewe itself as an auxiliary cruiser and other data required under the rules of International Law.

(Signed)

COUNT BERNSTORFF.

(Sent) #2.

March 14, 1916.

Please wire date on which papers are sent. Please hurry proceeding against ship in prize-court and wire judgment.

(Signed)

COUNT BERNSTORFF.

27

(Sent) #3.

March 21, 1916.

Hasten certified copies decision of prize-court in ship proceedings if possible before conclusion of cargo proceedings. Send certificate showing the date beginning preliminary proceedings of the prize-court in the Appam case. The libel was filed here February 16th. Court has set April 18th for trial.

(Signed)

COUNT BERNSTORFF.

(Received) #1.

BERLIN, March 19, 1916—(arrived March 21st).

(1.) The decision of the prize-court Hamburg in re Appam will be hurried as much as possible.

(2.) The papers concerning the commission of the Moewe, the commission of the commander of the Moewe, the commission of

Lieutenant Berg, extracts from naval officers' list and list of men of war will follow instantly. Please inform American court about impending arrival.

(Signed)

FOREIGN ZIMMERMANN.

2 2

(Received) #2.

BERLIN, April 3, 1916—(arrived April 5th).

(1.) The certificate that proceedings before the prize-court is pending since February 11th is on way.

(2.) All other desired documents are equally en route.

(3.) Proceedings of the German prize-court in re Appam are being expedited as much as possible, the condemnation of the ship is, however, impossible before beginning of May owing to the delays prescribed by the law.

(4.) The judgment will be transmitted immediately after the delivery.

(Signed) FOREIGN JAGOW.

(Signed) PRINZ v. HATSFELDT-TRACHENBERG.

(Copy of certificates of authentication waived.)

EXHIBIT NO. 2 WITH AFFIDAVIT OF HANS BERG.

Filed May 12th, 1916.

BERLIN, March 19, 1916—(arrived March 21st).

(1.) The decision of the prize-court Hamburg in re Appam will be hurried as much as possible.

(2.) The papers concerning the commission of the Moewe, the commission of the commander of the Moewe, the commission of Lieutenant Berg, extracts from naval officers' list and of list of men of war will follow instantly. Please inform American court about impending arrival.

(Signed)

FOREIGN ZIMMERMANN.

BERLIN, April 3, 1916—(arrived April 5th).

(1.) The certificate that proceedings before the prize court is pending since February 11th is on way.

(2.) All other desired documents are equally en route.

(3.) Proceedings of the German prize court in re Appam are being expedited as much as possible, the condemnation of the ship is, however, impossible before beginning of May owing to the delays prescribed by law.

(4.) The judgment will be transmitted immediately after the delivery.

(Signed)

FOREIGN JAGOW.

(Copy of certificates of authentication waived.)

Opinion of District Judge Waddill.

Filed July 29th, 1916.

Libels to Recover Possession of the Steamship "Appam" and of Her Cargo.

Messrs. Frederic R. Coudert, James K. Symmers, Howard Thayer Kingsbury and Ralph James M. Bullowa, all of New York City, and Hughes & Vandeventer, of Norfolk, Va., for libellants; Messrs. John W. Clifton, of Washington, D. C., Norvin R. Lindheim and Walter S. Penfield, of New York City, and Hughes, Little & Seawell, of Norfolk, Va., for respondents.

31 These are suits in admiralty, brought respectively by the owner and master, to recover possession of the British steamship "Appam," now lying at Newport News, Virginia, and her cargo. On the 15th of January, 1916, about three o'clock in the afternoon, during the existence of a state of war between the Empires of Great Britain and Germany, the steamship Appam was captured on the high seas by the German cruiser "Moewe," in latitude 33.19 N. longitude 14.24 W.

The Appam, flying the British flag, and registered as an English vessel, is a modern passenger and cargo steamship, 440 feet long, 58 feet broad, 35 feet deep, and 7,800 tons gross burden, built in Belfast, Ireland, in February, 1913, since which time she has been engaged in commerce, with the exception of a short period about a year prior to her capture, as hereinafter shown, when she was used as a transport for troops. She had made twelve voyages to, and was on the return trip of her thirteenth voyage from the West Coast of Africa to Liverpool, carrying a general cargo of cocoa beans, palm oil, kernals, tin, maize, sixteen boxes of specie, and other articles. At the West African port, she took on one hundred and seventy passengers, of whom twenty two were Germans, nineteen men and three women, eight of them being military prisoners of the English government. She had a crew of about one hundred and sixty all told, and carried a three pounder gun on her stern.

The Moewe, flying the German ensign, approached the Appam on her starboard side, and when about one hundred yards away, fired a gun across the bow of the latter as a signal to stop, which she did, and she was boarded, without resistance, by an armed crew from

32 the Moewe, who brought with them several buckets with peculiar looking things in them, some round, two bombs were slung, one over the bow, and one over the stern of the Appam. An officer from the Moewe said to the captain of the Appam that he was sorry, but he had to take his ship, and asked him how many passengers he had, and what cargo; whether he had any specie, and how much coal. When the shot was fired by the Moewe, the captain of the Appam instructed his wireless operator not to touch the wireless instrument, and his officers "on no account to let any one touch

that gun we have on board." The officers and crew of the Appam, with the exception of the engine room force, thirty-five in number, and the second officer, were then ordered on board the Moewe, where the captain was told by the officer commanding that vessel: "You are a very lucky man; I would have fired at you if you had attempted to escape; I would have sunk you." The captain, officers and crew of the Appam were then sent below, between decks, down in the hold, where they were kept until the evening of the seventeenth of January, when they and also about one hundred and fifty persons, officers and crews of five or six vessels previously sunk by the Moewe, were ordered back to the Appam, and kept on board as prisoners. At the time of the capture, the senior officer of the boarding party told the chief engineer of the Appam, that he was now a member of the German Navy; to which the chief replied that he did not think he was; and the senior officer said "This is no laughing matter, and if you do not obey my orders, I will blow your brains out, but if you obey me, not a hair of your head will be touched." He also told him to tell his staff the same thing, and if they did not obey his orders, to bring them to him, and they would be shot. He thereupon enquired as to the quantity of coal on hand, the various

33 revolutions of the engines; also the coal consumption for different speeds; and directed that steam be kept up handy, and about six o'clock in the evening, the engineer was directed to set the engines at the revolutions required, and they got under way. The German officer told the chief engineer to report to him at eight o'clock the next morning, the tonnage of coal and stores that he had, which he did. On reporting on the second morning, Mr. Berg was for the first time, seen by the engineer, and he was told that he (Berg) was now in charge of the ship, and asked him for the same information as to fuel consumption and revolutions which he had given to the former officer; and also said that he expected the engineer to help him all he could, and the more he did for him the better it would be for everybody on the ship. The engineer said he would, and did do so. The engines were operated with a bomb secured to the port main injector valve, and a German sailor was stationed alongside the bomb with a revolver. There was a guard below of four or five armed Germans, who relieved each other, and were constantly in the engine room, but did not interfere with the working of the engines. Lieutenant Berg gave directions as to working the engines, and was the only officer on board who wore uniform. On the night of the capture, January 15th, the specie in the specie room was taken by the boarding party and lowered into a boat, and then taken on board the raider. After Lieutenant Berg was put in charge of the Appam, and the officers and men were ordered back on board of her; bombs were slung over her bow and stern, one large bomb, said to contain about two hundred pounds of explosives, was placed on the bridge, and several smaller ones in the chart

room. When the captain of the Appam came on board 34 from the Moewe, Lieutenant Berg pointed to a large object standing on the deck, and said to him: "That is a bomb; if there is any trouble, mutiny, or attempt to take the ship, I have

orders to blow up the ship instantly." He also said "There are other bombs about the ship; I do not want to use it, but I shall be compelled to if there is any trouble." During the passage, the captain of the Appam asked Lieutenant Berg, if they met an English cruiser, what would be done, and Lieutenant Berg replied that if possible he would give them ten minutes to get into the boats, but if the cruiser attempted a capture, she would be blown up. The bombs were kept in the positions stated until the ship arrived at the Virginia Capes, when they were removed, and Lieutenant Berg asked the crew of the Appam to drop the anchor, as he had not men to do it, on reaching Hampton Roads.

During the trip westward, the officers and crew of the Appam were not allowed to see the ship's compass to ascertain her course; and all lights were obscured during the voyage; no one was allowed to smoke or strike matches on deck, and the power of the navigation lights was lessened also. The German prisoners, with the exception of two who went on board the Moewe, were armed, and placed over the passengers and crew of the Appam as a guard all the way across. They wore armulets, consisting of a white band around the arm, and had rifles and revolvers, and received their orders from Lieutenant Berg.

For two days following the capture, the Appam remained in the vicinity of the Moewe, until she was started westward. Her course for the first two or three days was southwesterly varying, and afterwards westerly, and so continued until her arrival at the Virginia

35 Capes on the 31st of January. The entire engine room staff of the Appam was on duty operating the vessel across to the United States; the deck crew of the Appam kept the ship clean, and the navigation was conducted entirely by the Germans, the lookouts being mostly German civilian prisoners. The night before the Appam arrived at the Capes, all of her crew were ordered below, and not allowed on deck after nine o'clock.

At the time of the capture, the Appam was approximately distant 1,590 miles from Emden, the nearest German port, and from the nearest available port, namely, Punchello, in the Maderias, 130 miles; from Liverpool, 1,450 miles, and from Hampton Roads, 3,051 miles.

The evidence shows that the Appam was in first class order, quite seaworthy, and with plenty of provisions both when captured, and at the time of her arrival in Hampton Roads.

There is no conflict in the testimony as to the facts stated, the same having been testified to by the master, first officer and chief engineer of the Appam. No witnesses were called in reply by the respondents, though Lieutenant Berg was present in court during the entire trial, and the German Crew remaining with him on the ship were within easy call of the court.

Upon her arrival at Hampton Roads, the Collector of the port was duly advised of the presence of the ship by Lieutenant Berg, and application was at once made to the Secretary of State for the vessel's internment, and also for the internment of the crew of the Appam, because of alleged resistance to capture. The right of in-

ternment of the Appam was denied, and her crew was released with their personal effects.

Subsequent to the filing of the libels, the perishable portion of the cargo of the Appam was ordered sold by the court, bringing
36 some six hundred and thirty four thousand dollars, which fund is now in the registry of the court awaiting the court's determination of this matter.

WADDILL, *District Judge* (after stating the facts as above) :

From this brief summary of the facts, it will be seen that the question for consideration is whether the vessel and her cargo, belonging to a subject of Great Britain, captured by a cruiser of the German Empire, upon the high seas, during the existence of war between the two countries, can be brought by a prize master and crew into the waters of the United States, for the purpose of being there laid up.

The libellants earnestly urge that this can not be done, and that the coming in, as well as the insistence upon the right of asylum under the circumstances of this case, constitutes a violation of the neutrality of the United States, entitling the owners to restitution of their property; whereas, the respondents maintain the right to bring in their prize, as well as the right of asylum for the same, during pleasure, pending the continuance of the war, and insist that such right exists as well under general international law, as under treaty existing between this country and Prussia, now a part of the German empire; that the prize is the property of the German government by reason of its capture from a citizen of a belligerent country on the high seas, by one of its duly commissioned war vessels; that the title or right of possession thereto can not be enquired into by this government, or the respondents impleaded in the courts of the United States; that the court of the captor country alone can
37 determine the validity of the seizure and title to said prize;

and that this government, under the existing treaty can not deny to the capturing country the right of asylum for said prize.

The court has been most fortunate in having the benefit of the arguments of able and accomplished counsel presenting the respective contentions; and almost every conceivable question and kindred subjects, bearing incidentally on the issues involved, have received the careful consideration of counsel, and the case has been fully, ably and completely presented and argued, which greatly lightens the burden of the court in reaching its conclusion, as well on the merits of the controversy, as in determining the crucial points involved, and eliminating those unnecessary to be passed upon.

The court will not attempt any general discussion or review of the authorities upon many of the views presented, as to do so would serve no good purpose, and unduly lengthen this opinion; but will confine itself to the consideration of the several material questions arising in the case, under its peculiar facts and circumstances. This, it will be borne in mind, is not a case of a war, public, or merchant vessel, seeking internment in the waters of the United States, nor of any such vessel coming in for temporary sojourn; nor a war vessel bringing in its prize captured at sea; nor of such war vessel sending

its prize under the convoy of a war vessel; nor a captor with its prize, forced in by reason of stress of weather, want of fuel or provisions, or for necessary repairs; but that of a vessel captured at sea, placed in charge of a prize master and 22 German sailors, who had been British prisoners on the Appam, and who, together with the Appam's crew, working under duress and threat of the loss of their lives, navigated the ship across the ocean, some fifteen hundred miles further from the scene of the capture, than to the nearest German port, into Hampton Roads, an inland water of the United States, within the jurisdiction of this court, for the purpose of indefinite asylum; the wording of the commission of the Prize Master being to "take her to the nearest American port and there to lay her up."

(Treating this case in its true light, these considerations arise, and become material, namely: (1) What are the rights existing between this country and Germany, respecting the right of entry of prizes of war captured at sea, and of asylum, in the waters of the United States, whether arising under treaty or international law. (2) Has this court jurisdiction to entertain these suits for restitution of the property in question to its owners; and (3) What is the character of the property seized, whether public or private, and can the court, as against the German government, who claims the right to adjudicate its title by its own prize court, determine the rights thereof, and afford relief as between the litigants.

First.

The respondents vigorously maintained from the coming in of the prize, and the inception of this litigation, the right to bring the Appam and her cargo in for the purpose of asylum, as well under treaty with this country, as under international law, and rely especially on the treaty between the United States and Prussia of 1799, as renewed and continued in 1828, in support thereof.

Promptly after the institution of these proceedings, the German government, acting through its Ambassador at Washington, filed protests with the Secretary of State of the United States, against the prosecution of the same, and the seizure of the ship and cargo, and requested that the United States, through their proper legal department, intervene and cause the dismissal of the proceedings. Whereupon, the Attorney General, acting through the United States Attorney for this district, appeared as amicus curiæ, and brought to the attention of the court, the aforesaid position of the German government; and the same defense was in more elaborate form interposed by the German government, in the proceedings in this cause. The German Ambassador, Count J. H. von Bernstorff, stated his government's position in his communication to the Secretary of State, as shown by the following extracts therefrom:

"As the 'Appam' was captured at sea by a German man of war and brought to the Virginia port as a prize ship according to the treaty existing between our countries, you may well appreciate my surprise at the action which has been taken.

"Article XIX of the treaty of 1799 between Prussia and the United States, renewed in part by Article XII of the treaty of 1828, provides that 'the vessels and effects taken from' the enemies of the contracting parties may be carried freely wheresoever they please and that such prizes shall not be 'put under legal process, when they come to and enter the ports of the other party, etc., etc.'

"In view of the terms of the treaty, I am at a loss to understand why such action has been taken by a court of your country. * * *

"Besides the 'Appam' flies the naval flag of and belongs to the German government and therefore the possession of the captors in a neutral port is the possession of their sovereign. The sovereign whose officers have captured the vessel as a prize of war remains in possession of that vessel and has full power over her. The neutral sovereign or its court can take no cognizance of the question of prize or no prize and cannot wrest from the possession of the captor a prize of war brought into its port."

He insisted also that Article 21 of the Hague Conventions concerning the rights and duties of neutral powers in naval war, had no application, because not assented to by Great Britain. In a later communication, he further contended that his government was entitled to the rights claimed under general principles of international law, as well as under the specific terms of the treaty aforesaid.

The Secretary of State, the Honorable Robert Lansing, although he complied with the German Ambassador's request to make known his country's contention to the court, made specific reply to his communications, setting forth his interpretation of the treaty relied on, as well as his understanding of the international law involved, and the position of the government of the United States regarding both matters, and of the right of the Appam and her cargo to seek asylum in the waters of the United States. The following extracts from the letters of the Secretary of State to the German Ambassador, dated respectively March 2nd, and April 7th, 1916, show fully and clearly his conclusions and rulings in the premises. (From letter of March 2, 1916, referred to.)

"Article XIX of the Treaty of 1799, to which Your Excellency refers, reads as follows:

"The vessels of war, public and private, of both parties, shall carry (conduire) freely, wheresoever they please, the vessels and effects taken (pris) from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes (prises) be arrested, searched, or put under legal process, when they come to and enter the ports of the other party, but may freely be carried (conduites) out again at any time by their captors (le vaisseau preneur) to the places expressed in their commissions, which the commanding officer of such vessel (le dit vaisseau) shall be obliged to show. But conformably to the treaties existing between the United States and Great Britain, no vessel (vaisseau) that shall have made a prize (pris) upon British subjects shall have a right to shelter in ports of the United States, but if (il est) forced therein by tempests, or any other danger or accident of the sea, they (il cerra) shall be obliged to depart as soon as possible."

(The last provision of the above treaty, excepting Great Britain from its operation, was abrogated by the treaty of 1828.)

"This translation is taken from the published treaties of the United States, and while not conforming strictly to the original French text (a copy of which is enclosed), is sufficiently accurate for the purposes of this note. At the outset it may be pointed out that as the object of this provision was to mollify the existing practice of nations as to asylum for prizes brought into neutral ports by men-of-war, it is subject to a strict interpretation when its privileges are invoked in a given case in modification of the established rule. By a reasonable interpretation of Article XIX, however, it seems clear that it is applicable only to prizes which are brought into American ports by vessels of war. The Appam, however, as Your

42 Excellency is aware was not accompanied by a ship of war, but came into the port of Norfolk alone in charge of a prize master and crew. Moreover, the treaty article allows to capturing vessels the privilege of carrying out their prizes again 'to the places expressed in their commissions.' The Commissions referred to are manifestly those of the captor vessels which accompany prizes into port and not those of the officers of the prizes arriving in port without convoy, and it is clear that the port of refuge was not to be made a port of ultimate destination or indefinite asylum. In the case of the Appam, the commission of Lieutenant Berg, a copy of which was given to the Collector of Customs at Norfolk, not only is a commission of a prize master, but directs him to bring the Appam to the nearest American port, and 'there to lay her up.' In the opinion of the government of the United States, therefore, the case of the Appam does not fall within the evident meaning of the treaty provision which contemplates temporary asylum for vessels of war accompanying prizes while en route to the places named in the commander's commission, but not the deposit of the spoils of war in an American port. In this interpretation of the treaty, which I believe is the only one warranted by the terms of the provision and by the British treaties referred to in Article XIX, and by other contemporaneous treaties, the Government of the United States considers itself free from any obligation to accord to the Appam the privileges stipulated in Article XIX of the Treaty of 1799.

"Under this construction of the Treaty, the Appam can enjoy only those privileges usually granted by maritime nations, including Germany, to prizes of War, namely, to enter neutral ports only
43 in case of stress of weather, want of fuel and provisions, or necessity of repairs, but to leave as soon as the cause of their entry has been removed."

(From letter of April 7th, 1916, referred to.)

"The Government of the United States agrees with the German Government's statement that the Treaty speaks of a mode of warfare in use at the time the Treaty was negotiated. It is precisely for this reason that the Government of the United States does not believe that the Treaty was intended to apply to circumstances of modern warfare which are essentially different from those in vogue at the close of the eighteenth century. The Government of the United States does not understand upon what ground the Imperial Gov-

ernment contends that a treaty granting concessions under specifically mentioned circumstances, can be construed to apply to a situation involving other and different circumstances. To grant limited asylum in a neutral port to a prize accompanied by the capturing vessel is not the granting of a right of 'laying up' in a neutral port of a prize which arrives in the control of a prize master and crew.

"Your Excellency's Government further contends that Article 19, besides being applicable to modern conditions, is not contrary to the general rules of International Law and therefore not subject to a restricting interpretation, and in support of this cites as declaratory of the general rules of International Law Article 23 of Hague Convention XIII. As indicated by the Imperial Government, the United States did not in the case of this convention, and never has, assented to the sequestration of prizes in its ports. The ground of this position of the United States is that it does not, in the opinion

of this Government, comport with the obligations of a neutral power to allow its ports to be used either as a place of indefinite refuge for belligerent prizes, or as a place for their sequestration during the proceedings of prize courts. The contention of the Government of the United States in its note of March 2nd in this case, is consistent with this long-established and well-known policy of the American Government in the light of which the Treaty of 1799 was negotiated and has been enforced and applied. Provided the vessel enters an American port accompanied by a German naval vessel, Article 19 contemplates in the view of this Government merely temporary sojourn of the prize in an American port and not its sequestration there pending the decision of a prize court.

"Holding the view that Article 19 is not applicable to the case of the Appam, this Government does not consider it necessary to discuss the contention of the Imperial Government that under Article 19 American Courts are without jurisdiction to interfere with the prize, and for the same reason it cannot accede to the request that the 'legal steps before an American court should be suspended.'"

The letter further stated that the question of the court's jurisdiction was one for judicial ascertainment, and not executive determination.

The correct determination of the questions presented by the notes of the diplomatic representatives of the two governments, will in large measure dispose of the more important issues involved in this litigation, since it is apparent that if the view taken by the German Ambassador of the Prussian Treaty be accepted, then the Appam had the right by express treaty to come in for the purpose of laying up, as her prize master's commission directed; and the German government would be entitled to the free use of the waters of the United States during the existence of the war, as a rendezvous, or indefinite place of abode for prizes of war.

The gravity of this situation is manifest, and if the contention is correct, its value to the German government, on the one hand, and the serious responsibilities and consequences to the United States on the other, can not well be over estimated. The weight that should be given to the opinion and ruling of the Secretary of State, and

able and accomplished diplomat, in construing the Prussian Treaty, need not be dwelt upon, since the court is in full accord with his interpretation, further than to say that it has special significance as a decision and ruling of the executive branch of the government, having to do with international matters, rendered after its authority had been invoked by the German government, in this very matter.

The history of the adoption of this treaty with Prussia, the conditions that brought about the same, and the contemporaneous opinions of the eminent statesmen of that day, who participated in its procurement and acceptance by the two countries, has been gone into fully in the effort to show that it was meant to give asylum to prizes in neutral waters; and that its particular purpose was to afford the United States an asylum for their prizes in Prussian waters. Whatever may have been the view of those representing this country at that time, it seems clear to the court that no such enlarged and far reaching view of the treaty as is now claimed for it, can for a moment be entertained at this day, in the light of present methods of warfare, and the laws, rules and regulations affecting the neutrality

of nations in existence now for nearly one hundred years. 46 Anciently it was believed permissible for one nation to grant to another, rights and privileges in its waters not granted to others. Such may be said to have been the character of our treaties of Amity and Commerce of 1778, with France; but the painful outcome of our experiences, growing out of those treaties, and the position taken by this government, ultimately, in connection with them, would seem to dispel the idea that this country, even in that early period, ever intended to afford a harbor of refuge for prizes of war of any other nation, and certainly such idea is now uniformly negated by the customs of all nations. Article XVII of the Treaty of Amity and Commerce, is substantially in the terms of the Prussian treaty now being considered; and under the interpretation placed upon it by the United States (see Mr. Jefferson's letter to Gallatin, June 28, 1801, Moore's Digest, sec. 1302, page 931), the claim here made that a prize master could bring in his prize for indefinite asylum, was not maintained.

A careful review of the provisions of the Prussian treaty, when read in the light of the rulings and interpretation placed upon other contemporaneous treaties, especially Article XVII of the treaty of Amity and Commerce with France in 1778, convinces the court that the Secretary of State's ruling is correct, and that under the same, prizes can not be brought into the waters of the United States for the purpose of laying up by a prize master, but can only be brought in by the capturing vessel herself, or a war vessel acting as convoy to such prize, and then not for an indefinite period, but for the temporary causes recognized by International Law.

What are the rights of the Appam under general international law. Was she entitled to come into the waters of the United 47 States, and if so, has she the right of asylum therein. These questions must be answered in the light of that law. The generally accepted doctrine now is that enlightened nations do not allow the use of their ports as asylum or permanent rendezvous of prizes of other nations captured during war. To do so would tend

to involve the neutral powers in conflict with nations with whom they are at peace; and to extend the use of their ports to all belligerents alike, would not relieve the objection, as the opposing vessels so using them might quickly cause conflict in neutral territory. The policy of the United States has been, and is consistently opposed to such use of their waters and harbors; and the history and origin of their neutrality laws, and the circumstances of their passage, clearly indicate a purpose to prohibit the use of their ports for the laying up of belligerent prizes.

The provisions of Articles 21 and 22 of the Hague Convention (XIII) of 1907, are declaratory of the existing law of nations, and the fact that Article 23, which provided for the use of neutral ports by belligerent prizes, was expressly rejected, and 21 and 22 adopted by the United States, but emphasises its policy respecting the subject. It is true Great Britain did not ratify the action of its Commissioners, assenting to the provisions of Articles 21 and 22 of the Hague Convention, though most of the other powers, some 43 in number, including Germany and the United States, did. Still, it nevertheless shows what the policy of the United States and Germany alike was, in regard to the use of their waters and harbors for belligerent prizes. Articles 21 and 22 are as follows:

"Article 21. A prize may only be brought into a neutral port on account of unseaworthiness, stress of weather, or want of fuel or provisions.

48 It must leave as soon as the circumstances which justified its entry are at an end. If it does not, the neutral power must order it to leave at once; should it fail to obey, the neutral power must employ the means at its disposal to release it with its officers and crew and to intern the prize crew."

"Article 22. A neutral power must, similarly, release a prize brought into one of its ports under circumstances other than those referred to in Article 21."

The American delegates reported regarding these Articles:

"Articles 21 and 25 relate to the admission of prizes to neutral ports. Articles 21 and 22 seem to be unobjectionable. Article 23 authorizes the neutral to permit prizes to enter its ports and to remain there pending action on their cases by the proper prize courts. This is objectionable for the reason that it involves a neutral in participation in the war to the extent of giving asylum to a prize which the belligerent may not be able to conduct to a home port. This article represents the revival of an ancient abuse, and should not be approved."

The Hague Convention (XIII) was signed at the Hague on the 13th of October, 1907, and was ratified by the Senate of the United States in executive session on the 17th of April, 1908. That body, however, excepted and excluded article 23 (36. Stat. L. part 2, p. 2438). The law, as shown in Dana's note (1866) to Wheaton's International Law, 8th American Edition, sec. 391, is as follows:

"The modern practice of neutrals prohibits the use of their ports by the prize of a belligerent, except in cases of necessity; and they may remain in the ports only for a meeting of the exigency. The

necessity must be one arising from perils of the seas, or need of repairs for seaworthiness, or provisions and supplies."

49 The British government, at the beginning of the civil war in the United States, took this position, and so instructed the British admiralty. Subsequently, like position was taken by other prominent powers, and the same view has been taken generally from time to time by different nations down to our war with Spain in 1898, and to the present time. It was said by Attorney General Wirt:

"It would be a breach of neutrality to permit a port to be made a cruising station for a belligerent, or a depot for his spoils and prisoners. It is not a breach of neutrality to permit a vessel captured as prize to be repaired in our ports, and put in a condition to be taken to the port of the captor for adjudication." (2 Op. Atty. Gen., 86.)

Mr. Seward, Secretary of State, replying to the Peruvian Legation as to the position of the United States respecting the war between Spain and Peru, said:

"This Government will observe the neutrality which is enjoined by its own Municipal Law and by the law of nations. No armed vessel of either party will be allowed to bring their prizes into the ports of the United States." Moore's Digest, Sec. 1302, p. 738.

In the *Flad Oyen* case, (1 C. Rob. 135) Lord Stowell, considering the subject, said:

"It gives one belligerent the unfair advantage of a new station of war which does not properly belong to him, and it gives to the other the unfair advantage of an active enemy in a quarter where no enemy would naturally be found. The coasts of Norway could no longer be approached by the British merchant with safety, and a suspension of commerce would soon be followed by a suspension of amity.

50 "Wisely, therefore, did the American Government defeat a similar attempt made on them, at an earlier period of the war; they knew that to permit such an exercise of the rights of war within their cities, would be to make their coasts a station of hostility."

Reference may also be had to Hall's *International Law*, 5th Edition, p. 618, and "Laws of War," Risley, p. 176; Bluntschli on *International Law*, sec. 778, Int. Law, Note.

The right of belligerents to use neutral waters, as an asylum for prizes, can no longer be successfully contended for.

Second.

Considering the question of the jurisdiction of the court to entertain these suits, for restitution of the *Appam* and her cargo to the owners of the same, raised by the respondent, and earnestly insisted upon in argument, it may be said, without discussing the precedents of other countries favorable thereto, that the jurisdiction and authority of the courts of admiralty of the United States to entertain possessory actions for the restitution to their owners, of prizes of war

seized for violation of the neutrality laws, is no longer open for serious consideration. The subject was long one of much controversy, particularly whether restitution should be made by the executive or judicial branches of the government, and the authorities for a time sustained the view that the courts were without such power. *Moxon v. The Fanny*, 2 Peters Admiralty, 309; 17 Fed. Cas. No. 9895; *Findley v. The William*, 1 Peters Admiralty, 12, 9 Fed. Cas. No. 4790; *Stanwick v. The Ship Friendship*, Bee's Admiralty Rep. 40; *Moodie v. The Ship Amity*, Bee's Admiralty Rep. 89.

51 But this position is no longer maintainable, and has not been since the decision of the supreme court in the case of the *Betsy*, 3 Dallas, 6. There the question of jurisdiction was directly raised, and the supreme court held that the district courts, being possessed of all the powers of courts of admiralty, instance as well as prize courts, were competent to decide whether restitution should be made, and the law has been thus settled for more than one hundred years. The *Santissima Trinidad*, 1 Brockenbrough 438, Fed. Cas. 2568, affirmed in 7 Wheat. 283, a case from this court, was a decision of Chief Justice Marshall, sitting in the circuit court, in which he at length considered the question of whether restitution could be made, as well by the court, as by the executive branch of the government, and whether the same should be awarded at the instance of the private owners, and he sustained the jurisdiction of the court in both particulars, and ordered restitution of the prize seized for violation of the neutrality laws of the United States, to its owners. The supreme court, on appeal, affirmed the decision of the district court, rendered by Judge Saint George Tucker, the able jurist and author, and that of Chief Justice Marshall, sitting in review on circuit, and said:

"1. That 'whatever may be the exemption of the public ship herself and of her armament and munitions of war, the prize property which she brings into our ports is liable to the jurisdiction of our courts for the purpose of examination and enquiry, and, if a proper case be made out, for restitution to those whose possession has been divested by a violation of our neutrality.'"

It is earnestly insisted on behalf of the respondents that notwithstanding these and like decisions containing the same views, restitution will be decree only in cases where the prize was captured within the territorial limits of the United States, or 52 the capturing vessel was illegally fitted out in this country, and that the court is without jurisdiction, save in the two classes of cases named.

There is much force in this position, especially as the adjudicated cases in the United States Supreme Court are mainly confined to those arising from the violation of the neutrality of one or other of the two prescribed classes. But it does not follow that had there been neutrality violations in other respects, a like remedy would not have been accorded. The jurisdiction was assumed, and the remedy afforded, because of the violation of the neutrality of the United States; and where the same arose either from an invasion of our territory by a belligerent, and the capture of an enemy vessel

in our waters, or by the fitting out of a vessel within this country for the purpose of depredating upon the commerce of the enemy, undoubtedly relief could be afforded by the restitution of the property thus unlawfully and forcibly taken, to its lawful owners. It was, however, not because it occurred in either of the two ways indicated. Had a like result followed in other unlawful manner, whereby there was an infraction of the neutrality of the United States, exactly the same relief should and would have been given. The question, therefore, to be determined in the present case is, in the language of the supreme court in the *Santissima Trinidad* case, 7 Wheat. 354-5, whether a proper case has been made out against the prize property, upon examination and enquiry, justifying its restitution to those from whom it was taken, by reason of bringing the same into our ports in violation of our neutrality; if so, the relief asked for by the libellants should be granted, entirely regardless of whether a like case may have heretofore arisen, or whether any other court of the United States may have been called upon to meet a similar contingency. Let it once be conceded that the

53 prize is within neutral territory, and it was there brought in violation of the laws of neutrality, whether arising from breach of treaty obligation, or by reason of international law, then, under the laws of the United States, the right of restitution arises, and its courts of admiralty charged with the administration and enforcement of international law respecting maritime matters, should in a proper case, afford relief, by restoring the prize property to its lawful owner.

In *Paquete Habana*, 175 U. S. 677, 700, Mr. Justice Gray, speaking for the supreme court, said:

"International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act, or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, not for the speculations of their authors concerning what the law ought to be but for trustworthy evidence of what the law really is." *Hylton v. Guyot*, 159 U. S. 113, 163, 164, 214, 215; *The Estrella*, supra, 4 Wheat. 298; *The brigantine Vrouw Christina Magdalena*, Fed. Cas. 7216; *The Adventure*, 8 Cranch. 221.

The last named case is an illuminating one in the light of the contention made here. The *Adventure* was a British vessel which had been captured on the high seas by two French frigates, and after taking out parts of her cargo, she was given by the captors to the American crews (then neutral) of two vessels which the French frigates had just captured and burned. The *Adventure* was thereupon navigated by her donees to Norfolk, where she arrived

54 on the first day of October, 1812, and was promptly libelled by the acting captain and crew as their property, acquired under the donation of the French captor. The United States appeared and interposed a claim for forfeiture under the "Non-Im-

portation" act. The case finally reached the Supreme Court of the United States, where it was decided adversely alike to the claim of the government, and that of the libellants, and determined in favor of the British owners, subject to the adjustment of complications which had arisen between that government and this country, growing out of hostilities which occurred after the bringing in of the prize property; and that the donees, the libellants, as citizens of a neutral country, were entitled only to a proper reward for safe-keeping the property, and bringing it into a neutral port, the court saying:

"Upon the donation, therefore, whatever right might, in the abstract, have existed in the captor, the donee could acquire no more than what was consistent with his neutral character to take. He could be in no better situation than a prize master navigating the prize in pursuance of orders from his commander. The vessel remained liable to British capture on the whole voyage, and, on her arrival in a neutral territory, the donee sank into a mere bailee for the British claimant, with those rights over the thing in possession which the civil law gave for the care and labor bestowed upon it."

This decision is significant in its bearing upon this case. It was a capture on the high seas, and jurisdiction was entertained, and the property restored to its owner, although it did not come within the two exceptions contended for by the respondents. Moreover, it negatives the idea of a complete title in the captor, and in effect

maintains that the prize master could not have brought the
55 prize into neutral waters, without forfeiting the same to the owner; and that his right to bring the vessel *infra presidia* (a place of safety) into this country, unless excused on account of necessity, would have been an unneutral act, reviving the right of the owner to the vessel.

The Queen v. The Chesapeake, 1 Oldright's Nova Scotia Reports, 769, was the case of an American vessel sailing from New York, captured by certain persons bearing a commission from the Confederate States Government, shipped thereon as passengers. After sailing from New York, they overpowered the captain and crew, and took the vessel into a Canadian port. Suit was instituted in the name of the Crown for forfeiture of the vessel for violation of the British neutrality. Claim was made on behalf of the private owners, and restitution was ordered, on payment of costs and expenses. (Moore's Digest, International Law, vol. 1, p. 366, vol. 7, p. 937.) In the course of his opinion deciding the question, the judge of the vice-admiralty court said: "By the affidavits upon which I granted a warrant it is certain that the Chesapeake, if a prize at all, is an uncondemned prize. For a belligerent to bring an uncondemned prize into a neutral port to avoid recapture is an offense so grave against a neutral state that it *ipso facto* subjects that prize to forfeiture. For a neutral state to afford such protection would be an act justly offensive to the other belligerent state." At the prior hearing of the case, the court also said: "I am of opinion that no use of a neutral territory for the purposes of war is to be permitted. I do not say remote uses, such as procuring provisions

and refreshments and acts of that nature which the Law of Nations universally tolerates, but that no proximate acts of war are in any way whatever to be allowed to originate on neutral grounds."

This power on the part of the courts of the United States may not be given specifically by any statute, as required for the exercise of criminal jurisdiction, but arises from the authority reposed in them under the constitution as courts of admiralty and common law, charged with the duty of administering the law of nations.

Third.

Respondents further maintain that the Appam and her cargo can not be proceeded against in these causes, because title to the same vested in the German Government by reason of capture at sea by a German war vessel from an enemy country; that the Appam is a lawful prize of war, entitled to remain in the waters of the United States, a neutral power, without interference on the part of that government; and that its title can only be enquired into and divested by the action of the prize court of their own country.

No claim that the Appam is a public war vessel of the German empire can be maintained under the facts of this case. Indeed, in the pleadings, the contention is not made, and on the contrary she is claimed to be a prize of war, which places her in an entirely different category as respects title and ownership. Under modern authority, title does not become vested in the captor of the prize by mere capture, and not until lawful condemnation is had by the proper court of the captor country. This is particularly true where the prize is not taken into the captor's country. In the *Nassau*, 4 Wall. 640, the Supreme Court of the United States said:

"It is the practice with civilized nations when a vessel is captured at sea as a prize of war, to bring her into some convenient port of the government of the captor for adjudication. The title is not transferred by the mere fact of capture, but it is the duty of the captor to send his prize home, in order that judicial inquiry may be instituted to determine whether the capture was lawful, and if so, to settle all intervening claims of property."

In the *Manila Prize Cases*, 188 U. S. 260, the supreme court said: "Ordinarily the property must be brought in for adjudication, as the question is one of title, which does not vest until condemnation."

The Resolution, 2 Dallas 1, 5.

The reason of this rule is manifest; and arises from the fact that until lawful condemnation by a court of competent jurisdiction is had of the prize property, the title of the captor, as between himself and the owner, is incomplete and inchoate, and circumstances may readily arise, of which this case affords an example, in which the title of the captor might never become vested, by reason of his own act.

Nor is the contention tenable that the Appam and her cargo have the undisputed right to stay in the United States, and that that

Government can not controvert her right, or this court entertain jurisdiction of these proceedings, and grant the proper relief to the libellants, irrespective of what the German prize court may do regarding the condemnation of the prize property. If the prize had been taken to a port of the captor country, or that of one of its allies, instead of to this, a neutral country, in violation of its laws, and of its international obligations to other countries, there would be great force in the position taken. Here, a very different situation arises.

in which it is manifest that the claim that this court should wait, or be controlled by what the German prize court does, is without merit. This position as to the effect of the prize court proceedings of the captor country has been often taken, and nowhere more positively denied than by the Supreme Court of the United States; and the same may now be said to be generally settled adversely to the claim made.

In *L'Invincible*, 1 Wheat. 238, the court said:

"That the mere fact of seizure as prize does not of itself oust the neutral admiralty court of its jurisdiction is evident from this fact, that there are acknowledged cases in which the courts of a neutral may interfere to divest possession, to wit, those in which her own right to stand neutral is invaded."

— The *Divina Pastora*, 4 Wheat. 52, the court said: "But if, on the other hand, it was shown that the capture was made in violation of our neutral rights and duties, restitution would be decreed to the original owners."

In the *Santissima Trinidad* case, 7 Wheat. 554-5, *supra*, the supreme court further said:

"And 2, 'That where a property is already in the custody of a neutral tribunal, and the title is in litigation there, no other foreign court can by its adjudication rightfully take away its jurisdiction or forestall and defeat its judgment.'"

Other cases sustaining these general views will be found in the same volume of Wheaton's Reports, pages 490, 496, 520.

In the case of the *Henrick and Maria*, 4 C. Rob. 43, Lord Stowell said: "Upon principle, therefore, it is not to be asserted that a ship brought into a neutral port is with effect proceeded against in the belligerent country. The *res ipsa*, the corpus, is not within the possession of the court; and possession, in such cases, founds the jurisdiction."

Dr. Lushington, the great authority on maritime matters, said:

"I wish it, moreover, to be expressly understood, that this case is decided upon its own peculiar circumstances, and is not to be considered as a precedent for the condemnation of a prize while lying in a neutral port. The rule is that the prize shall be brought into a port belonging to the captor's country, and the court must guard itself against allowing a precedent to the contrary to be established." (The *Polka*, Spink's Ecclesiastical and Admiralty Reports, 447.)

In Dana's Note to Wheaton's International Law, 1866, it is said:

"But apart from any such practice of neutrals, it seems clear that to allow prizes to fly to a neutral port and remain there in safety while prize proceedings are going on in a home port, would give occasion to nearly all the objections that exist against prize courts

in neutral ports. It seems, therefore, to be the tendency, if not the settled rule, now, that a decree of condemnation will not be passed against prizes remaining abroad, unless in case of necessity, or if passed, will not be respected by other nations."

(Wheaton's Int. Law, 8th Am. Ed. Sec. 391.)

The further contention is made by the respondent that the violation of neutrality to be cognizable, must be proved to have contributed to the capture, and that subsequent or otherwise unrelated violations are immaterial. This proposition the court cannot assent to; that is, that there may be no violations of neutrality after the

60 prize is captured, entitling the belligerent owner to restitution at the hands of a neutral government, in whose country the property may be found. In this case, the fact should not be lost sight of that the violation of the neutrality of the United States is exceedingly closely related to the capture itself. This capture, it is true, was well away on the high seas, but the captors of their own volition, and for their own purposes, determined not to take, or attempt to take the prize to one of their own ports, or that of their allies, where alone the validity of the capture could be determined, though in distance not more than half so far away as the United States, nor to hazard longer the chances of her recapture at sea, but required the ship's officers and crew, under duress, to bring the ship into the nearest port of the United States, there to be laid up, and she was so brought, and the effort to secure permission to lay up was unsuccessfully made. From the moment of the capture, to that of entering the Virginia Capes, the Appam and her cargo were subject to recapture by the ships of the owner's country or that of their allies, or to be retaken by the owner. Should other or greater rights be secured by taking refuge in the harbor of a neutral, which the Appam had no right to enter without flagrantly violating the laws of neutrality. Does not such violation having for its object the getting away with the prize and the safe keeping of the same, so relate back to the original seizure, as to become a part thereof. Is not the capture, the flight to a supposed place of safety, and the successful entry therein, but one continuous occurrence, and should she, thus attempting to avail herself of the use of neutral waters for the purpose of escape with her prize, in contravention of the laws of neutrality, do so, without at the same time incurring the consequences of the violation? The failure to take, or even

61 attempt to take the prize to a port of the captor's country, or that of an ally, where prize proceedings could regularly and lawfully have been inaugurated, should prevent the captor from denying to the owner a day to be heard in the courts of the neutral country, where of choice, the prize had been brought and deposited, respecting his right to restitution of his property by reason of the violation of the neutrality of such neutral country. The validity of the capture, as well as all questions of prize law, are to be determined by the German prize court, and are not matters for the consideration of this court; but this court has the right to determine whether the neutrality laws of the United States have been violated, and the consequences thereof, as bearing upon the restitution of the

prize property to its owners, (The Estrella, 4 Wheat. 308) and in a proper case to restore the same to them.

The court's conclusion is that the manner of bringing the Appam into the waters of the United States, as well as her presence in those waters, constitutes a violation of the neutrality of the United States; that she came in without bidding or permission; that she is here in violation of law; that she is unable to leave for lack of a crew, which she cannot provide or argument without further violation of neutrality; that in her present condition, she is without lawful right to be and remain in these waters; that she, as between her captors and owners, to all practical intents and purposes, must be treated as abandoned, and stranded upon our shores; and that her owners are entitled to restitution of their property, which this court should award, irrespective of the prize court proceedings of the court of the Imperial Government of the German Empire; and it will be so ordered.

62

Final Decree.

Entered and Filed September 28th, 1916.

This cause came on to be heard on May 12, 1916, whereupon respondents moved for a postponement on the grounds stated in the affidavit of Hans Berg, and exhibits filed herewith, which motion was overruled by the court, to which respondents excepted:

And thereupon the cause came on to be heard upon the pleadings and proofs, and was argued by counsel.

The said hearing was at the same time as the hearing of the case of British and African Steam Navigation Co. Limited, v. the Steamer Appam, the evidence in said case being by agreement treated as the evidence herein, and the cases heard together in all respects except as to the entry of separate orders.

Prior to said hearing the perishable portion of the cargo had, by order of court on motion of Libellant (respondents not consenting thereto) been sold as perishable, and the proceeds of such sale, amounting to upwards of \$600,000 been deposited in the Registry of the Court.

And the Court not being then fully advised in the premises, took time to consider thereof.

And the Court, being now of opinion, for reasons stated in writing and filed as part hereof, that it has jurisdiction in the premises, and that libellant is entitled to the relief prayed for in the libel herein, doth order, adjudge and decree that the exceptions and plea of respondents to the jurisdiction be and the same are hereby overruled and that the Marshal of this District do deliver to libellant the possession of the unsold portion of the cargo herein, as of the 29th day of July, 1916, on which date the opinion of this Court was rendered and filed, and that the libellant is entitled to the net proceeds of the sale of such portions of the said cargo as have been sold as aforementioned, together with any increment thereof, and that libellant recover of and from the respondents the costs of the court duly taxed.

And thereupon the respondents presented to the court their petition for appeal and assignment of errors, praying the allowance of an appeal and supersedeas to this decree, and praying also that a transcript of the record in the cause may be sent up to the Supreme Court of the United States, and praying also for other relief:

And thereupon an appeal is hereby allowed in open court, bond to be given in the penalty of \$30,000.00 the same to operate as a supersedeas, staying all further proceedings in the execution of this decree, said bond to be executed with surity, to be approved by this court, or judge thereof, and payable and conditioned that the respondents shall prosecute their appeal to effect, and if they fail to make their plea good shall answer all damages and costs;

64 And thereupon the respondents tendered a bond in the words and figures following, to-wit:

In the United States District Court for the Eastern District of Virginia.

In Admiralty.

HENRY G. HARRISON, Master,

v.

CARGO OF STEAMER "APPAM."

Know all men by these presents, that we, Hans Berg, Prize-master, and L. M. von Schilling, German Vice-Consul, respondents and claimants, in this cause as principals, and The American Surety Company of New York as surety, are held and firmly bound unto the said Henry G. Harrison, Master, in the just and full sum of Thirty Thousand Dollars (\$30,000), to which payment well and truly to be made, the said Hans Berg, prize-master and L. M. von Schilling, German Vice-consul, as principals and the surety do hereby bind themselves and their and each of their executors, administrators, successors and assigns, firmly by these presents.

Sealed with our seals and dated this 28th day of September, 1916.

Whereas on this day in the above entitled cause a final decree has been entered in favor of libellant and an appeal therefrom in open court has been prayed, and a clause therein provides that the execution of the said decree is suspended on executing an appeal bond,

Now, the condition of this obligation is such that if the above named claimants and respondents shall prosecute their appeal to effect and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.]

HANS BERG. [SEAL.]
L. M. VON SCHILLING. [SEAL.]
AMERICAN SURETY COMPANY
OF NEW YORK,

By F. C. MILLER,

Resident Vice President

Attest:

L. T. DOBIE,

Resident Assistant Secretary.

65 And the same was executed and approved in open court to operate as a supersedeas, the unsold portion of the cargo of the steamer Appam to be held in the custody of the Marshal of this District pending such appeal, and the proceeds of sale after portion sold under the control of the court and subject to all orders of this court looking to its proper care and preservation.

And it is further ordered that, pending such appeal, the respondents do advance to the Marshal of this District, in cash, monthly, all costs and expenses attending the keeping of the said cargo in the custody of the said Marshal, including all expenditures that may be necessary in the discretion of the Marshal, subject to the supervision of the court, to keep said steamship in good condition and to prevent her from deteriorating in said custody.

EDMUND WADDILL, JR.,
U. S. District Judge.

Norfolk, Va., September 28, 1916.

66 *Petition for Appeal.*

Filed September 28th, 1916.

The claimants and respondents, H. Berg, Prize-master, and L. M. von Schilling, German Vice-consul, considering themselves aggrieved by the final decree of the District Court made and entered on the 28th day of September, 1916, hereby appeal from the whole of said decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors herewith filed, and prays that this appeal may be allowed, and that the said decree may be suspended during the pendency of this appeal; that a transcript of said record on appeal may be sent to the Supreme Court of the United States, and that said decree may be reviewed and reversed by said Court, and that respondents and claimants may have such other and further relief as the nature of the case may require.

HANS BERG, *Prizemaster*,
L. M. VON SCHILLING,
Vice-Consul,

By FREDERICK W. LEHMANN,
JNO. W. CLIFTON,
ROBT. M. HUGHES,
W. S. PENFIELD, *Proctors*.

67 *Assignment of Errors.*

Filed September 28th, 1916.

The claimant and respondent assign the following errors:

1. The court erred in holding that the treaties between Germany and the United States had no application to this case.
2. The court erred in holding that the Prize-master and crew of the Appam were not entitled under the provisions of said treaties to

enter the harbor of Hampton Roads and lay up there, or remain there for the time shown by the record in this case, with said steamer, a lawful prize of war, without being subject to restitution to her former owners.

3. The court erred in denying the exemption of said prize while in said port from being arrested, searched or put under legal process, as provided in said treaties.

4. The court erred in holding that under the general principles of the law of nations the act of the prize-master and crew in bringing their said prize into said port under a bona fide claim of a treaty right, and remaining there under the circumstances shown

68 in this case, constituted such a violation of the neutrality of this country as entitled the former owner of said prize to a restitution of said prize by a decree of court.

5. The court erred in holding that it had jurisdiction to decree restitution under the circumstances shown in this case.

6. The court erred in holding that the title of the captor as against the former owner was not complete till formal condemnation.

7. The court erred in denying respondent's motion for a postponement till the close of the prize proceedings in Germany and reasonable opportunity to secure and file a complete record thereof; and to take testimony in Germany on commission; and in holding that the proceedings in this case were not affected by reason of said proceedings.

8. The court erred in entering a final decree in favor of libellant and in not dismissing the libel with costs.

HANS BERG, *Prize Master*,
L. M. VON SCHILLING, *Vice-Consul*,

By FREDERICK W. LEHMANN,
JNO. W. CLIFTON,
ROBT. M. HUGHES,
W. S. PENFIELD, *Proctors*.

69 *Stipulation of Proctors as to Record on Appeal.*

Filed October 4th, 1916.

It is agreed that the record in this case shall consist of the following:

Libel.

Protest of Lieutenant Hans Berg filed March 15, 1916.

Claim.

Exceptions, Plea and Answer.

Interrogatories as allowed.

Answer- to same.

Affidavit of Berg and exhibits therewith as to postponement.

Final Decree, containing copy of bond; the allowance of appeal, and opinion of court.

Petition for appeal.

Assignment of errors.

This Agreement.

Order to transmit record.

Certificate.

In order to shorten this record as much as possible, it is further agreed that this case came on and was heard at the same time as the case of the British and African Steam Navigation Company, Limited, against the Steamship "Appam", from which an appeal has been taken and which appeal is now pending as No. 650, October term, 1916. Although the decrees are kept separate these two cases were practically heard as one.

It is therefore agreed that the evidence in the said main case shall be considered as a part of this record as fully as if the same were herein reprinted; and that either side is at liberty to use any part of the record in the main case in addition to the evidence that may be desired, or may be pertinent, as fully as if the same were set out in this record and printed as part of this record.

It is further agreed that during the progress of this case the libellant moved the court to sell a large part of the cargo as perishable; that on said motion the court appointed surveyors who examined the said cargo and reported that the parts so designated as perishable should be sold; that upon their report orders of sale were entered, under which the parts so reported as perishable were sold, and that the proceeds of said sale, amounting to over \$600,000 are now in the registry of the court, and the unsold portions of the cargo are in the custody of the Marshal of this District.

ROBT. M. HUGHES,
For Appellants.
FLOYD HUGHES,
For Appellees.

October 3, 1916.

71

Order to Transmit Record.

Thereupon, it is ordered by the Court here that a transcript of the record and proceedings in the foregoing cause, with all things thereunto relating, as stipulated by proctors of record, be transmitted to the Supreme Court of the United States at Washington, D. C.

And the same is transmitted accordingly.

Teste:

JOSEPH P. BRADY, *Clerk*,
By D. ARTHUR KELSEY,
Deputy Clerk.

Certificate of the Clerk

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, Joseph P. Brady, Clerk of the United States District Court for the Eastern District of Virginia, do hereby certify that the foregoing is a full and true record of the proceedings and judgment of the said Court, as stipulated by proctors of record, in the therein entitled cause.

In testimony whereof, I hereunto set my hand and affix the seal of the said Court, at Norfolk, in said district, on this 10th day of October, 1916.

[Seal U. S. District Court, Eastern Dist. of Virginia.]

JOSEPH P. BRADY, *Clerk*,
By D. ARTHUR KELSEY,
Deputy Clerk.

Endorsed on cover: File No. 25,552. E. Virginia D. C. U. S. Term No. 722. Hans Berg, prize master in charge of the prize ship "Appam," and L. M. Von Schilling, vice consul of the German Empire, appellants, vs. Henry G. Harrison, master of the steamship "Appam." Filed October 14th, 1916. File No. 25,552.

Office Supreme Court, U. S.

FILED

DEC 5 1916

JAMES D. MAHER
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 722.

HANS BERG, PRIZE MASTER IN CHARGE OF THE PRIZE SHIP "APPAM", AND
L. M. VON SCHILLING, VICE-CONSUL OF THE GERMAN EMPIRE,
Appellants,

VS.

HENRY G. HARRISON, MASTER OF THE STEAMSHIP "APPAM",
Appellee.

MOTION TO ADVANCE.

JAMES K. SYMMERS,
HERBERT BARRY,

Counsel for Appellee.

Supreme Court of the United States, 1

OCTOBER TERM, 1916.

No. 722.

HANS BERG, Prize Master in
charge of the Prize Ship
"APPAM" and L. M. VON
SCHILLING, Vice-Consul of the
German Empire,
Appellants,

vs.

HENRY G. HARRISON, Master of
the Steamship "APPAM",
Appellee.

2

Now comes Henry G. Harrison, the appellee above named, by his counsel James K. Symmers and Herbert Barry, and moves that this cause be advanced upon the docket of this Court and set down for hearing upon some early date to be fixed by this Court, upon the following grounds:—

1. This is a suit in Admiralty by the master to recover possession of the cargo of the Steamship *Appam* taken as a prize upon the high seas by a German cruiser during the present War and sent under a Prize Master into a Port of the United States with instructions there to lay up said vessel and cargo. The District Court awarded possession to the libellant but stayed execution of the decree pending this appeal. 3

2. This cause involves important questions of international law and especially the question whether a naval prize may be sequestered in a neutral port of the United States.

- 4 3. This cause involves important questions affecting the Treaty relations of the United States with the German Empire and especially the construction, application and effect of certain provisions of the Treaties of 1799 and 1828 between the United States and the Kingdom of Prussia referred to in the appellants' answer herein.

4. The legal questions involved in this cause have a direct bearing upon the diplomatic and international relations of the United States with belligerents in the present war and it is to the public interest that these questions should be determined by this Court as speedily as practicable.

- 5 5. This cause involves the same questions as are involved in the case of the same appellants against British & African Steam Navigation Company, Limited (Number 650, October Term, 1916) in which a motion to advance was submitted to this Court on November 20th, 1916.

The said causes were tried together in the District Court and were decided under one opinion, although separate decrees were filed and separate appeals have been taken.

Dated, December 4, 1916.

JAMES K. SYMMERS,
HERBERT BARRY,
Counsel for Appellee.

6

The appellants above named consent to this application.

Counsel for Appellants.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 722.

**HANS BERG, PRIZE MASTER IN CHARGE OF THE PRIZE SHIP
"APPAM", AND L. M. VON SCHILLING, VICE CONSUL
OF THE GERMAN EMPIRE, APPELLANTS,**

vs.

**HENRY G. HARRISON, MASTER OF THE STEAMSHIP
"APPAM".**

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF VIRGINIA.**

This is a companion to case No. 650. That was a libel filed by the original owner, the British and African Steam Navigation Company against the ship *Appam*, seeking restitution of the vessel, while this is a libel filed by the master of the vessel, seeking, as bailee for the original owners, restitution of the cargo. The one case involves the ship and the other the cargo. In other respects they are the same. The original owners in each case are British, the circumstances of the capture and of the coming into port were

necessarily the same in each case, and the same rules of law and treaty provisions are applicable. We submit this case upon the brief filed in the case of the vessel.

Respectfully submitted,

JOHN W. CLIFTON.
FREDERICK W. LEHMANN.
NORVIN R. LINDHEIM.
ROBERT M. HUGHES.



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IN THE
Supreme Court of the United States,
OCTOBER TERM, 1916.

No. 722.

HANS BERG, Prize master in charge of the Prize
ship "APPAM", and L. M. VON SCHILLING, Vice
Consul of the German Empire, Appellants,

VS.

HENRY G. HARRISON, master of the Steamship
"APPAM".

**NOTES OF ORAL ARGUMENT SUPPLEMENT-
ING THE BRIEF IN BEHALF OF AP-
PELLEE.**

Every material issue arising in this cause will be
determined in the answers to the following ques-
tions:

1. Does the Prusso-American treaty apply?
2. If not, was the bringing in of the "Appam" in the circumstances disclosed permissible under international law as recognized and enforced in the United States?

3. Did the court below rightfully exercise jurisdiction and properly vindicate our neutrality by its decree of restitution?

All these questions are considered at length in the briefs filed, and it is not thought that it will be useful to attempt to add much to what is said in appellees' brief. One or two phases, however, may possibly be dwelt on further to advantage, and first the question of the legal effect of the seizure.

**LEGAL EFFECT
OF SEIZURE.**

It is our contention that the question of the nature of the title, inchoate or otherwise, acquired by a belligerent through maritime capture is academic, and that whatever the nature of that title may be, it may be divested by our neutral government when our neutrality is violated by reason of the belligerent sending the vessel captured into one of our ports for the purpose of indefinite asylum.

As the appellants, however, appear to think it of importance to them to endeavor to show that full title to a maritime capture is vested in the government of the captor at the time of the seizure, I shall, in this argument, treat it more in detail than my own views of its importance would justify.

**SCOTT'S
OPINION.**

In his article in the January, 1916, number of the *American Journal of International Law* (Volume 10, pp. 104-112) Dr. Scott expresses the opinion (p. 105) that—

“As according to the practice of nations it is legal to capture private property of the enemy upon the high seas, it would seem that capture vests title in the captor, and that judicial proceedings in such a case are only instituted by the government of the captor in order to determine whether the circumstances of the case justify capture, and if there be a municipal statute or practice granting the indi-

vidual captors a share of the prize money, to apportion the shares to which each person taking part in the capture is entitled."

He quotes from Hall's International Law, and adds that he has quoted these passages from Hall's treatise, as the statements by Hall on these questions are confusing, and as statements of a conflicting nature are to be found in the reports. He then goes on to deal with *Commodore Stewart's Case* (1 C. Cls. 113), in which, he says, "perhaps the clearest statement on the question of passing title is to be found", and apparently his own opinion on the question has been largely influenced, if not determined, by the opinion in that case.

He again considers that case at length in his article in the same Journal (October, 1916, Vol. 10, p. 827), where he remarks upon the confusion existing in the books on the question of the effect of capture.

In *Commodore Stewart's Case* the question was COMMODORE STEWART'S CASE. whether the individual captor had acquired any vested right by reason of the capture by him on the high seas of the "Levant," which was taken into a Portuguese port, where it was seized by the British in alleged violation of Portuguese neutrality. Chief Justice Casey, speaking for the Court, said:

"The principle applicable to this case, to be extracted from the authorities cited, is that by the capture of this ship the property to it vested in the United States, and whatever right to or title in it the claimants acquired must be derived from their sovereign authority."

In holding that Commodore Stewart had no right to or title in the capture except such as might be granted by the sovereign authority of the United States (which was the question necessary to be decided in the case) the Court doubtless correctly stated the result of the authorities. But, assuming

that the court meant to say that complete title or *dominium* was taken out of the original owner and vested in the government of the captor at the time of capture, it was not warranted by the authorities cited in the opinion, and upon which the court expressly rested its ruling in this respect.

The authorities cited by the Court upon this point were: Grotius, Lib. III, cap. 6, sec. 3; cap. 9, sec. 14; Kluber, *Droit des Gens Moderne de l'Europe*, sec. 254; Vattel, Bk. 3, cap. 13, sec. 196; cap. 14, sec. 209; Heffter, *Das Europäische Völkerrecht*, sec. 136.

Reference to these authorities will show that none of them supports the *dictum*.

Grotius in the place cited says:

GROTIUS.

"Things are considered as captured when they are brought within the boundaries or *infra præsidia*, under the protection of the enemy.

Whence it seems to follow that at sea ships and other things captured are understood to be captured when, and not till, they are brought into dock or harbor or to the place where the fleet is; for then recovery becomes desperate."

KLUBER.

Kluber (*loc. cit.*, section 254) speaks of the twenty-four hour rule as relating, by the general consent of nations, only to booty captured in war conducted on land. He adds in the same section that some governments recognize the same rule as governing prizes, while others act on the principle that the property right of the original owner is not completely ousted until the prize is taken *infra præsidia*. He adds in a note that this latter was the Roman view, and that the same doctrine is laid down in the *Consolato del Mare*, ch. cclxxxvii.

VATTEL.

Vattel (Bk. 3, cap. 13, sec. 196) says:

"The ownership of movable property vests in the enemy as soon as such property comes into his power; and if he sells it to neutral

nations, the original owner cannot assert a claim. But such property must be really in the power of the enemy and must have been taken to a place of safety.

Likewise, at sea, a vessel captured by the enemy, so long as it has not been taken into a port or into the midst of a fleet, may be recaptured and delivered by other vessels of the same state.

The fate of the vessel is not decided, nor the property rights in it irretrievably lost to the owner until the captor has taken it to a place of safety and brought it completely within his power."

Heffter in sec. 136 is speaking of booty captured HEFFTER. in land warfare, and says that the original owner, upon finding in a neutral country the property taken from him by a belligerent enemy, has the right to assert there his ownership; and the author distinguishes between complete title or *dominium*, and that limited right to the thing possessed which the belligerent captor has as long as he retains firm possession. In other words, he distinguishes between ownership and the right of possession through capture. That he was correct in recognizing this distinction conclusively appears when we inquire into the nature of the peculiar right of possessing which is styled the right of possession; a right of possessing that arises exclusively from the fact of an adverse possession.

In Austin's Lectures on Jurisprudence (4th ed., AUSTIN. pp. 53-55) are found the notes of a lecture he had prepared, but which he did not live to deliver, in which he summarizes the result of his analysis of rights based on possession. He speaks of the source of his teachings on this subject as being Von Savigny's treatise, *Das Recht des Besitzes* (edition Giessen, 1837). He refers to that treatise in the following terms:

"of all books upon law, the most consummate and masterly; and of all books which I pretend

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to know accurately the least alloyed with error and imperfection."

CIVILIANS.

It is confidently submitted that the divergent views, which, as Dr. Scott remarks, are found in the reports, will largely be reconciled if we bear in mind the analysis made by Von Savigny, the correctness of which is recognized generally by modern commentators on the Roman Civil Law (see Accarias, *Droit Romain*, Volume 1, Sec. 211 *et seq.*; Didier-Pailbé, *Droit Romain* (4th ed., Paris), ch. 4, pp. 156-162; see also Amos, *Roman Civil Law*, pp. 157-158).

The idea of possession involves two elements, one the *corpus*, or thing possessed, and the other, the *animus domini*, or the firm intention of treating the thing possessed as the property of the possessor. A captor, for instance, who seizes a ship with the express intention of treating her as prize, and thereby necessarily obtains physical possession of cargo that is contained in the vessel, cannot be said to possess the cargo in the same sense as he possesses the vessel, unless it was his intention to seize the cargo likewise as prize. In other words, so far as concerned the cargo only one element of possession would thus appear (*corpus*), and the other necessary element (*animus domini*) would be absent.

The argument of appellants is very largely dependent upon the establishment of the proposition that immediately upon the capture of *The Appam* (which they contend was not only begun, but completed, upon the high seas), the property seized vested in and became that of the German Empire. Its alleged immunity to neutral interference is based upon this claim, as a matter of International law. This contention ignores or disregards the very limited right gained by such a seizure before condemnation, or, at the very least, before arrival of the vessel seized *infra præsidia*. Possession, as Ulpian

pointed out, has nothing in common with ownership (L. 12, § 1, De acq. vel. amitt. poss.). Among the "divergent views" referred to by Dr. Scott loose expressions doubtless can and will be pointed out in support of appellant's contention in this behalf, but it is not necessary to go out of their own brief to find a striking illustration in a decision of this Court showing the correct principle to be as we contend. On page 41 of appellant's brief reference is made to the facts of the *Invincible*. The *Invincible* was a French privateer. She was captured by a British ship during the war of 1812. Possession by the captors was retained about a month when she was captured by an American privateer; these American captors in turn retained possession also about a month when she was captured again by a British ship. The British enjoyed this second possession for several weeks and again lost possession through American capture.

The *Invincible* was then brought into Portland, Maine, and was proceeded against as prize. The French consul interposed a claim for the French owners for restitution, subject to salvage.

This Court decided that the French owners were entitled to restitution—a decision that could not have been rendered had this Court shared the present appellant's view that the first British capture divested the French ownership and vested it in the British; that the first capture of the *Invincible* in turn by the Americans divested this "ownership" and vested it in the Americans, and so on until the arrival of the prize in the American port.

In fact, no property right of any kind results from a mere seizure of enemy property on the high seas. The right to destroy the capture is not a right of ownership but a belligerent right to destroy *enemy property*. Some confusion appears in the books upon this point and we find even Homer nodding in one paragraph of Kent where that author seems to

confuse the rules formerly applied generally to booty captured in land warfare with the rule obtaining in respect of maritime capture.

Kent.

Kent (1. Commentaries, 12th ed., p. 102) says:

"If any prize is taken at sea, it must be brought, with due care, into some convenient port for adjudication by a competent court; though, strictly speaking, as between the belligerent parties, the title passes, and is vested when the capture is complete, and that was formerly held to be *complete and perfect when the battle was over and the spes recuperandi was gone.*"

On page 103, however, he adds:

"By the modern usage of nations, neither the twenty-four hours' possession nor the bringing the prize *infra præsidia* is sufficient to change the property in the case of a maritime capture. A judicial inquiry must pass upon the case, and the present enlightened practice of commercial nations has subjected all such captures to the scrutiny of judicial tribunals as the only sure way to furnish due proof that the seizure was lawful. . . . Until the capture becomes invested with the character of prize by a sentence of condemnation, the right of property is in abeyance or in a state of legal sequestration."

What capture on the high seas really divests is *possession*, not ownership. As Kent says, the *ownership* is not altered until condemnation. Some authorities are not so strict and think that the ownership is divested when the capture is brought *infra præsidia* of the captor's fleet, of a port of the government of the captor, or of a port of an ally or of a neutral that permits prizes to be brought in to await condemnation.

The appellant emphasizes the importance of the decision of this Court in the case of the "Mary Ford" (Brief, 23, 25). But that decision has no im-

portant bearing. There the Supreme Court, in its memorandum, merely said:

"In determining the question of property, we think, that immediately upon the capture the captors acquired *such a right* as no neutral nation could justly impugn or destroy; and consequently we cannot say that the abandonment of the 'Mary Ford', *under the circumstances of this case*, revived and restored the interest of the original British proprietors" (p. 198).

The *Mary Ford* was a vessel found apparently "MARY FORD." derelict on the high seas by Americans who brought her into the port of Boston and there libelled her for, and recovered, salvage. No question was involved of any violation of our neutrality, and the decision merely was that the abandonment of the *Mary Ford* by her captors *in the circumstances of the particular case* did not, *ipso facto*, revive and restore the interest of the original British proprietors.

This holding was apparently pursuant to the argument of the appellee (*id.*, p. 198) that the abandonment, having been *not from choice but of necessity*, left unimpaired such right as the captors acquired with possession, which they made firm by taking the vessel *infra præsidia* of the French fleet.

If the case could properly be understood as being "ADVENTURE." in any wise in conflict with the later decision in the case of *The Adventure* (8 Cr. 221) the fact would only strengthen *The Adventure* as a precedent, because, as Lord Bacon says:

"An example rejected in the same or next succeeding age, should not easily be received again when the same case recurs; for it makes not so much in its favor that men sometimes used it, as in its disfavor that they dropped it upon experience."

(Advancement of Learning, Book 8, c. 3—

"Precedents" Aphorism No. 30.)

"JOSEFA
SEGUNDA."

Another case strongly emphasized by appellants is the *Josefa Segunda*, 5 Wheat. 338. This was a libel for forfeiture for alleged violation of the Seventh section of an act of Congress prohibiting the importation of slaves into the United States. This section of the act provided:

"That if any ship or vessel shall be found in any river, port, bay or harbor or on the high seas, within the jurisdiction or limits of the United States, or hovering on the coast thereof, having on board any negro, mulatto or person of color for the purpose of selling them as slaves, or with intent to land the same in any port or place within the jurisdiction of the United States" "every such ship or vessel shall be forfeited to the use of the United States", etc.

It was found that the "*Josefa Segunda*" shortly before her seizure had been hovering on the coast of the United States having on board a large number of negroes with the intention of disposing of them as slaves within the United States. The libel was based on the violation of the act of Congress and no question of international law was involved. Incidentally it was recited that the capture of the "*Josefa Segunda*" on the high seas had been regularly made and that the courts of neutral nations had no right to interfere, "except in cases which do not embrace the present capture" (p. 358).

It appears at page 349 that the exceptions referred to relate to a violation of our neutrality. The Court said, page 358:

"The captors, therefore, at the time of the violation of our laws must be regarded as the lawful owners of the property and as capable of working a forfeiture of it by any infraction on their part of the municipal regulations of the United States."

By "lawful owners" of the property the Supreme Court must have meant that they were lawfully in possession by right of capture on the high seas under a regular commission and therefore capable of working a forfeiture in the same sense as a charterer or other person having lawful possession of the *res* could work a forfeiture thereof. The decision may be explained upon the theory of the liability of the *res* considered as the offending thing, a theory now familiar in our law and fully dealt with in Holmes' "*The Common Law*", pp. 25-29. See also *The Malek Adhel*, 2 How. 210-234.

The Sally Magee, 3 Wallace, 451, dealt entirely with the cargo and is merely an illustration of the familiar rule that ownership of property *in transitu* cannot be changed to the prejudice of the captor. "SALLY MAGEE."

Dr. Scott, who in the first of his articles above mentioned says that "it would seem that capture vests title in the captor", on the same page (*American Journal of International Law*, January, 1916, Volume 10, page 105) admits that it has become the settled practice of nations to proceed against the vessel captured in a competent prize court, and Mr. Hall, whom he quotes on the same page, also admits that, "It is the universal practice" for the belligerent to guard the interests of neutrals, SCOTT. HALL.

"by requiring captors, as a general rule, to bring their prizes into port for adjudication by a tribunal competent to decide whether the captured vessel and its cargo are in fact wholly, or only in part, the property of the enemy."

The reasons given for the practice may or may not be sound. The important fact is that the practice itself is settled and universal.

In *Oakes v. United States* (1899), 174 U. S., 778, *OAKES v. U. S.* 786, this court said:

"By the law of nations, as recognized and administered in this country, when movable

property in the hands of the enemy, used or intended to be used for hostile purposes, is captured by land forces, the title passes to the captors as soon as they have reduced the property to firm possession; but when such property is captured by naval forces, a judicial decree of condemnation is usually necessary to complete the title of the captors.

1 Kent Com., 102, 110;

Halleck, Int. Law, c. 19, sec. 7; c. 30, sec. 4;

Kirk v. Lynd, 106 U. S., 315, 317".

Moore, Int. Law Dig., Vol. 7, page 631.

POSSIBLE
NEUTRAL
INTEREST.

As we have seen, the authorities all agree on the point that the rights of the original *neutral* owner certainly cannot be deemed to be ousted by maritime capture before a decree of a competent court adjudging the capture good prize. Appellants argue that this admittedly correct doctrine is not applicable here, because of the alleged fact that both vessel and cargo were enemy owned. But in this do not the appellants take too much for granted? It was not necessary for such neutrals as may have owned portions of the cargo of the "Appam" to allege and prove neutral ownership in the court below. The libel was filed in behalf of all the owners of the cargo by the master as bailee. In view of the assumption indulged by appellants, the Court's attention perhaps should be directed to the pleadings in the cargo case and to the evidence respecting the detention of the cargo.

LIBEL.

The libel in behalf of cargo does not allege any seizure of the cargo libeled, or any detention of said cargo on the high seas. It alleges that the *steamer* was seized on the high seas, and that she *with her cargo* subsequently arrived at Newport News, and that

"the cargo of said steamship 'Appam' has been and is unlawfully held and detained at Newport News; and that by holding and detaining the

said cargo at Newport News the said Hans Berg and others . . . have violated the . . . neutrality of the United States," etc. (Rec., No. 722, pp. 2, 3).

The answer does not put this in issue, but merely ANSWER. alleges:

"It does not appear that according to the law of nations and the laws of the United States they have not been and are not entitled to hold and detain *the said steamer* at Newport News" (Rec. No. 722, p. 7).

The eighth article of the answer (Rec. No. 722, p. 8) merely puts libellant to his proof that he was master, and as such bailee entitled to the cargo for the owner thereof.

Nor is there in the case a scintilla of evidence that EVIDENCE. the "Möwe" or Lieutenant Berg ever seized or intended to seize the cargo when they took the vessel. Lieutenant Berg's instructions did not mention or relate to the cargo (Rec. No. 722, p. 12), but ordered him to take the vessel in and lay her up. The evidence as to what the captors intended to seize, as gathered from their statements to the master of the "Appam" at the time of the capture, is to the effect that they intended to seize the ship:

"I am very sorry, Captain, but I must take your ship" (Rec. No. 650, p. 23),

and nothing was said about seizure of cargo, although inquiry as to its nature was made. The evidence as to the prize proceedings instituted in Germany, if competent, only shows that the vessel was proceeded against there (Rec. No. 722, pp. 14, 15).

The German Ambassador never protested against and objected to the court taking jurisdiction of the master's libel against cargo, although he carefully caused to be put on record his protest in case No. 650, the libel filed in behalf of the owner of the

AMBASSADOR'S
PROTEST, &c.

vessel. His later suggestion to the State Department that the matter be left to arbitration concerned only the vessel's case—not that of the cargo (Rec. No. 650, pp. 70, 71).

Non constat but that for good reasons the captors refrained from seizing the cargo proceeded against herein, and that Lieutenant Berg and the German Consul were acting without authority in assuming to detain it from its owners after it reached Newport News. Certainly it cannot be said that the seizure of cargo is to be implied in the seizure of its container, the vessel. Lieutenant Berg was in court and did not take the stand. If there ever were a seizure of the cargo as such on the high seas, or any intention of claiming it as prize captured there, he could have testified accordingly, and his failure to take the stand, notwithstanding that there was no other evidence tending to show a seizure of the cargo, should be conclusive that there was no such seizure.

The seizure of the specie and of the contents of the purser's till (Rec. No. 722, p. 10), respondents themselves say, "are not material to the issues in this cause"—those items not being part of the cargo proceeded against.

The inference is that the specie was seized as contraband, and that a distinction was made by the "Möwe" between this portion of the cargo and the remainder.

**LIBELANT'S
PROOF.**

The libelant has proved that he was the master of the "Appam". As such he was the bailee of the cargo. As bailee he is entitled to the possession of the cargo, which the Germans certainly could not take in our waters. At the time the master filed his libel the vessel was not in possession or control of the respondents, but in the custody of the court under process issued in the suit brought by her owners, and the respondents have not shown that

they have any interest in the cargo, any right to detain it, or any right to intervene in this case as claimants thereof.

It is true that in a competent prize court the cargo of an enemy vessel is presumed to be enemy cargo; but that presumption will not be entertained or avail the appellants here, where there is no proof of any intention to seize the cargo here libelled, and where, as the authorities above cited show, intention to seize is an essential prerequisite to the acquisition of the limited title that arises from the fact of firm possession.

It is deemed unnecessary, however, to emphasize this defect in appellants' pleading and proof. The case of the cargo and the case of the hull might safely be rested upon the violation of our neutrality.

Expressions may be found in the older authorities, and even in our own decisions, that seem to evidence that prior to 1860 neutrals sometimes permitted belligerent prizes to lie up in neutral ports pending condemnation. Phillimore said that no regular practice had prevailed up to his time (Vol. 3, p. 577). But whatever the international practice recognized by us in this regard may have been a hundred years ago, certainly our practice, and the practice of the other great commercial nations, since the beginning of our civil war, has been to forbid a prize to be brought into a neutral port except for the reasons now specified in article 21 of the Hague Convention, XIII of 1907.

This is abundantly shown in Admiral Semmes' interesting "Memoirs of Service Afloat".

PRACTICE FROM
1860 ON.

The attitude of the United States, if uncertain before, was sufficiently definite on this question from the very beginning of the war and Semmes soon found that Great Britain, France, Spain, Holland and other countries shared our government's view. Semmes' prizes were uniformly excluded from all

neutral ports. We find him writing the Military Governor of Cadiz, January 5, 1862 (*Ib.*, p. 298), as follows:

"I am aware of the rule adopted by Spain, in common with the other great powers, prohibiting belligerents from bringing their prizes into her ports, but this rule I have not violated."

On July 24, 1861 (*Id.*, p. 161), he writes that as a last resort he had endeavored to avail himself in this way of the ports of certain "beggarly South American Republics".

"But, as the reader will see, I reckoned without my host. . . . If they had admitted my prizes into their ports, I could, in the course of a few months, have made those same ports more busy with the hum and thrift of commerce than they had ever been before; I could have given a new impulse to their revolutions, and made them rich enough to indulge in the luxury of a *pronunciamiento*, once a week. The bait was tempting, but there stood the great lion in their path—the model Republic. The fact is I must do this model Republic the justice to say that it not only bullied the little South American republics, but all the world besides. Even old John Bull, grown rich and plethoric and asthmatic and gouty, trembled when he thought of his rich argosies, and of the possibility of Yankee privateers chasing them" (*Ib.*, pp. 161, 162; for further references see pp. 151, 152; 532, 533).

Of this phase of this violation nothing more need be said, but there is another that may be mentioned which alone would justify restitution of the capture to the libelants.

It is elementary international law that

"the duty of navigating the vessel to such port as the captors may please to direct is not imposed upon the master and crew of a captured vessel. They owe no service to the cap-

VIOLATION OF
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ENFORCED
WORK IN OUR
WATERS.

tors, and are still to be considered answerable to the owners for their conduct.

It is the duty as well as the interest of the captors to make the capture sure; if they neglect it, from any anxiety to make other captures, or thinking the force already furnished sufficient, it is exclusively at their peril."

(Wildman, Int. Law (Phila. ed., 1850), Volume II, p. 97.)

In the present case the prize crew was insufficient to bring the vessel in; she was operated by her original crew under threats of death. While this may not have concerned us so long as the outrage was confined to the high seas, this compulsory operation of the vessel from the three-mile limit to place of anchorage (for the threats did not purport to be confined to the operation on the high seas) was an outrage continuing within our neutral waters, continued there because it was necessary to *complete the capture*, and this was in itself a breach of our neutrality that warranted the release of the vessel and cargo.

If it be contended that, by reason of being used incidentally to transport the *Möwe's* prisoners to land, the *Appam* is to be treated as our State Department treated the *Farn*, the distinction is clear. The *Farn* was commissioned *bona fide* and officered and used regularly as a tender. She was thus stamped by the German Government as a public vessel as effectually, in the circumstances perhaps, under the practice of Nations, as if she had been regularly condemned by a Prize Court. Semmes was perfectly familiar with this distinction. Speaking of his tender, the *Tuscaloosa*, he writes (*Ib.*, p. 663): "The Sovereign Power of the Confederacy . . . had commissioned her as a ship of war, which was the most solemn condemnation of the Prize that the Sovereign could give." Semmes captured a vessel—the *Ariel* (*Ib.*, pp. 532, 533), which stood to him

in the same relation as the *Appam* to the *Möwe*. "The *Ariel*", he says, "was indeed a California steamer, but instead of being a homeward bound steamer, with a million of dollars in gold in her safe, I had captured an outward bound steamer, with five hundred women and children on board! This was an elephant I had not bargained for, and I was seriously embarrassed to know what to do with it. I could not take her into any neutral port, even for landing the passengers, as this was forbidden by those unfriendly orders in council I have more than once spoken of, and I had no room for the passengers on board the *Alabama*. The most that I could hope to do was to capture some less valuable prize within the next few days, turn the passengers of the *Ariel* on board of her, and destroy the steamer."

To Semmes' honor be it said that it never entered his head to pretend that she was a *tender* by which these women and children might be sent to port. On the contrary, no other prize being available, as hoped for, he turned the *Ariel* loose and sent her passengers on their way rejoicing.

And so with the *Appam*. The *Möwe's* orders to the prize master, the pleadings, the diplomatic correspondence, the wireless messages from Germany—all the evidence in the case—stamp her as a captured merchantman intended to be reduced to the status prize. Any other suggestion would be a mere after thought of counsel.

CONSTRUCTION
OF TREATY.

One word as to the proper interpretation of the treaty:

Appellants invoke a liberal construction of the treaty. In the first place, no document, treaty or otherwise, admits of construction, liberal or illiberal, except where it is ambiguous.

Hauenstein v. Lynham, 100 U. S. 483, 487.

It is submitted that there is no necessity for "construction" in respect of this particular treaty at all. It is plain and unambiguous. Even were it otherwise, there is nothing in the nature of maritime capture of private property on the high seas that should induce any modern court to lean in favor of rights claimed thereunder.

On July 28, 1823, Mr. Adams, Secretary of State, wrote to our Minister to England as follows:

"It has been remarked that by the usages of modern war the private property of an enemy is protected from seizure and confiscation as such; and private war itself has been almost universally exploded *upon the land*. By an exception, the reason of which it is not easy to perceive, the private property of an enemy *upon the sea* has not so fully received the benefit of the same principle. Private war, banished by the tacit and general consent of Christian nations from their territories, has taken its last refuge upon the ocean and there continued to disgrace and afflict them by a system of licensed robbery, bearing all the most atrocious characters of piracy. To a government intent, from motives of general benevolence and humanity, upon the final and total suppression of the slave trade, it cannot be unreasonable to claim her aid and co-operation to the abolition of private war upon the sea.

NATURE OF
SEIZURE OF
PRIVATE
PROPERTY.

From the time when the United States took their place among the nations of the earth this has been one of their favorite objects.

'It is time,' said Dr. Franklin in a letter of 14 March, 1785, 'it is high time for the sake of humanity that a stop were put to this enormity. The United States of America, though better situated than any European nation to make profit by privateering, are, as far as in them lies, endeavoring to abolish the practice by offering in all their treaties with other powers an article engaging solemnly that in case of future war no privateer shall be commissioned on either side, and that unarmed merchant ships on both sides shall pursue their voyages

unmolested. This will be a happy improvement of the law of nations. The humane and the just can not but wish general success to the proposition.' "

(Moore, Int. Law Dig., Volume 7, pages 462-463).

NO EXTENSION
OF TREATY TO
CASES OMITTED.

Apropos of the contention that a liberal construction should be given to the terms of this treaty to the end that our neutral Government may render such aid to Germany as will make effectual her capture on the high seas of a merchant ship belonging to subjects of a friendly country, the Court is again referred to Lord Bacon, who said that it is enough for such statutes as were made upon particular urgent occasions of state to contain themselves within their proper cases after those occasions cease,

"for it were preposterous to extend them in any measure to cases omitted."

(Advancement of Learning, 8th book, c. 3,

"Application and Extension of Laws",—

Aphorism No. 15.)

states that it is contrary to the extension of the treaty to a condition of affairs not contemplated by it.
Summary. *The treaty was made*

I need not repeat what is said in our principal brief or what my learned associate has already said. The considerations I have advanced are intended to be not exhaustive, but merely supplemental. It sufficiently appears that the *Appam* had no right to come in under the treaty; that under international law as recognized and enforced by us since 1861 and recently re-announced by us in the rejection of the proposed Art. 23 of The Hague Convention, she was forbidden to come in as she did. That her coming in, in the face of this prohibition, was a clear breach of our neutrality and that in restoring her to her British owners the

District Court properly vindicated the right of our country to stand neutral and did just what Great Britain would have done, as evidenced by her practice during our civil war, were our positions reversed, and just what her Colonial Court did in the case of *The Chesapeake*.

In the case of *The Santissima Trinidad* (7 Wheat. 283) Mr. Justice Story said: "It does not lie in the mouth of wrongdoers to set up a title derived from a violation of our neutrality." It is true that in that case the violation was the unlawful fitting out of the cruiser in our ports. But the same language is appropriate to the violation of our neutrality in the present case.

As long as the *Appam* was on the high seas her captors had possession, but no title—no *jus in re*. And even that possession was of so infirm a character that her captors could hope to make it firm and of any value only by proceeding, by an unfrequented route without showing flag or lights, to an American port where it was fancied that an ungrateful republic might forget the practice, of the civilized world, that we ourselves procured to be adopted in 1861.

Respectfully submitted,

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